

RED TAPE REVIEW GROUP  
FINDINGS & RECOMMENDATIONS

APRIL 19, 2010



SUBMITTED BY

Honorable Kim Guadagno, Lieutenant Governor, Chair

Honorable Steven V. Oroho, Senator, District 24

Honorable John J. Burzichelli, Deputy Speaker, District 3

Honorable Scott T. Rumana, Assemblyman District 40

Honorable Bob Martin, Commissioner of Environmental Protection

Honorable Lori Grifa, Acting Commissioner of Community Affairs

Honorable Jeffrey S. Chiesa, Chief Counsel to the Governor

April 19, 2010

Dear Governor Christie:

We are pleased to submit the report of the Red Tape Review Group, the delivery of which fulfills a promise that you made to the people of New Jersey to bring about a fundamental change in the manner in which administrative rules and regulations are promulgated.

The Group has conducted its meetings in a transparent and bi-partisan fashion, and has arrived at a series of unanimous recommendations to improve the regulatory process and thereby promote job creation and retention, economic growth and investment in New Jersey.

The Group would like to extend its appreciation to the Department of Environmental Protection, which provided stenographic services for our meetings, as well as the administrations of Rowan University, Brookdale Community College and Montclair State University, which graciously provided their facilities for our public meetings.

We again thank you for the opportunity to serve the people of the State of New Jersey in this important endeavor. The work of the Red Tape Review Group has been completed pursuant to the provisions of Executive Order No. 3 (2010). Accordingly, we believe that there is no further need to continue Executive Order No. 3 as currently drafted, and request that the order be rescinded.

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## I. INTRODUCTION

New Jersey possesses an enviable geographic location, a well-developed network of highways, rail lines, airports and port facilities, noteworthy institutions of higher education and a highly-educated workforce. These attributes have long been the essential ingredients of the State's prosperity.

In recent years New Jersey has increasingly been less able to compete with other states when it comes to opening or maintaining a business, and creating or maintaining jobs. The 2009 *Small Business Survival Index* of the Small Business & Entrepreneurship Council ranked New Jersey 50<sup>th</sup>, out of 50 states and the District of Columbia, based on the public policy climate that the State has created for small business and entrepreneurship.<sup>1</sup> A 2009 survey of 543 CEOs conducted by *Chief Executive* Magazine ranked New Jersey 48<sup>th</sup> among the states for job and business growth.<sup>2</sup>

Against this backdrop, there has been an emerging bi-partisan consensus to improve New Jersey's reputation as a place to establish or grow a business, and create and maintain good-paying jobs. The non-partisan Tax Foundation notes that modern market is characterized by "mobile capital and labor" and that companies will locate where they have the greatest competitive advantage.<sup>3</sup>

Employers who seek to bring jobs and economic growth to New Jersey, or maintain or expand business already located in this State, have suggested that the extensive system of administrative rules and regulations promulgated by State agencies needs to be improved. When compared with other states, New Jersey's regulatory system is regarded as being unpredictable, overly-complicated and often contradictory. In order to allow New Jersey to better compete with other states, policymakers in both the Executive and Legislative Branches of State believe that administrative rulemaking by State agencies should be revised and improved. A new approach to administrative rule-making should be implemented to ensure that the substantive and procedural requirements for rules and regulations:

- Rely upon sound science or other technical data or information;

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<sup>1</sup> Raymond J. Keating, *Small Business Survival Index 2009: Ranking the Policy Environment for Entrepreneurship Across the Nation*, Small Business & Entrepreneurship Council, <http://www.sbecouncil.org/uploads/SBSI2009.pdf> (February 9, 2010)

<sup>2</sup> "CEOs Select Best, Worst States for Job Growth and Business," *Chief Executive*, March 25, 2009, <http://www.chiefexecutive.net/media/usbestandworststates/2009> (February 9, 2010)

<sup>3</sup> Kail Padgitt, *Background Paper: 2010 State Business Tax Climate Index*, Tax Foundation, <http://www.taxfoundation.org/files/bp59.pdf>, (February 19, 2010).

- Are consistent with broader State policy goals;
- Are consistent with the intent of the legislation under which they are promulgated where appropriate; and
- Protect and promote the public interest, including the urgent need to promote economic development and encourage private-sector job creation.

The State Government should not view the success of its regulatory framework through the prism of how many pages of complex paperwork it imposes on entrepreneurs and small business owners, or by the dollar amounts of the fines and fees it collects from people who cannot navigate the intricacies of that system. The success of the State's regulatory system should rightly be measured by how well it achieves compliance with State policy goals.

Fortunately, these goals can be accomplished, and the perception of New Jersey can be changed, without triggering a regulatory "race to the bottom" where public health, environmental and safety standards are compromised in the name of economic progress. There is nothing that is inherently safer, healthier or environmentally-friendly about a system of administrative rules that is incomprehensible, confusing and contradictory.

The Red Tape Review Group's limited mandate was to "review pending and proposed rules and regulations, as well as all operative Executive Orders from previous administrations, in order to assess their effects on New Jersey's economy and to determine whether their burdens on business and workers outweigh their intended benefits." While this report focuses primarily on this mandate, it also chronicles a number of other legislative, regulatory and policy issues that the Group encountered during its deliberations that address a number of long-range policy issues relating to reform of the regulatory system.

It was against this background that the following report was prepared.



## II. EXECUTIVE SUMMARY

This report presents the recommendations of the bi-partisan Red Tape Review Group created under Executive Order No. 3 (2010) and chaired by Lieutenant Governor Kim Guadagno. The Group was charged in Executive Order No. 3 to “review all pending and proposed rules and regulations, as well as all operative Executive Orders from previous administrations, in order to assess their effects on New Jersey’s economy and to determine whether their burdens on business and workers outweigh their intended benefits.”

A series of recommendations follows this summary, categorized by type: Legislative, Regulatory and Policy. The central thesis of this report is simple and clear: the state must achieve a better balance between protecting the public and nurturing free enterprise. The recommendations in this report seek to address the most common complaints the Group heard about the State’s regulatory climate from business people, educators, environmentalists, health care professionals and local government officials during its 90 days of operation, and to incorporate positive suggestions from this broad cross-section of stakeholders. The overarching theme of what the Group heard, as reflected in the recommendations, is that there is a great need for the application of common sense in rule-making and rule enforcement and that State Government must learn to operate in a user-friendly manner.

The report begins with the synopsis of the deliberations of the Red Tape Review Group and the process it used to collect its information, beginning with the gubernatorial transition and ending with a series of public meetings. An informal red tape review team began its outreach to constituent groups during the gubernatorial transition and analyzed the regulatory reform efforts of other states. The team also reviewed 800 pages of proposed regulations that would greet the new Administration when it took office and identified the rules that could be frozen without negative impact. On his first day in office, Governor Christie executed the freeze on proposed regulations in Executive Order No. 1 and a 90-day moratorium on new proposals was instituted. As a first step toward applying the “Common Sense Principles for Rulemaking” of Executive Order No. 2, State agencies were directed to review the frozen proposals for consistency with the order and rescind or modify them as necessary.

The bi-partisan Red Tape Review Group was formed with representatives from both the Legislative and Executive Branches of State Government. In March 2010, the Group began a series of three public meetings at colleges and universities in the southern, central and northern regions of New Jersey. From preliminary work done during the transition, the Group was able to determine the three issues, respectively, that each meeting would address: 1) amending the “Administrative Procedure Act” that governs rule-making; 2) seeking new and better ways to eliminate unfunded local mandates; and, 3) hearing testimony on specific regulations for consistency with “Common Sense Principles.” Well over 100 witnesses testified at the Red Tape

Review Group meetings, while other stakeholders submitted written testimony. In addition, legislative members of the Group held public hearings on regulatory reform in their individual districts.

The next section of this report delves into the bi-partisan recommendations of the Group, starting with those that would be achieved through legislation. While the issue of final decision authority by Administrative Law Judges will require further review, the Group recommends other amendments to the “Administrative Procedure Act” that should expedite both the rule-making and the administrative hearing processes. The Group also recommends new strategies to eliminate unfunded mandates by empowering the Council on Local Mandates to seek out mandates for elimination and by expanding the types of entities that are permitted to bring complaints before the Council. Issues such as affordable housing, Civil Service (particularly as it pertains to mergers and shared services) and binding interest arbitration were among the most cited of onerous burdens at the unfunded mandates hearing. Finally, task forces, committees and advisory boards that exist in name only should be eliminated via legislation or executive order where appropriate.

The following section of the report deals with recommendations that are regulatory in nature and a discussion of the “Common Sense Principles” in Executive Order No. 2. Executive Order No. 1 suspended or “froze” 128 proposed and contemplated administrative rules and regulations that were pending when the administration took office, while 70 proposed rules were permitted to proceed to adoption because it was determined that they fell under exceptions for health, safety, federal compliance or essential agency operations. At the conclusion of the 90-day review period, 16 proposed rules were withdrawn in order to be modified or rescinded as a result of the Red Tape Review process. Given the much larger number of rules already in the New Jersey Administrative Code, the agencies were given a six-month window to review existing regulations for compliance with Executive Order No. 2. Finally, the Group cites some examples of more striking regulatory shortcomings that witnesses identified at the Group’s public meetings.

The report then addresses recommendations that are of a policy nature, such as changing the culture of State agencies so that they become more customer-oriented. The better deployment of information technology with regard to on-line permitting and the State business portal, as well as improved coordination among departments, is recommended. The group acknowledged that the Office of Smart Growth has not lived up to expectations and perhaps needs to be reorganized as a key strategic group. Witnesses throughout the Red Tape Review process consistently defined “one-stop shopping” for permits relating to significant economic development projects as a compelling need. This should be a key feature of a new economic development entity.

The Red Tape Review Group was given a limited mandate and a comparatively short time-frame to complete its work. Accordingly, the final recommendation discusses how to

continue to advance regulatory reform through the vehicle of an ongoing Red Tape Review Committee. Lastly, in order to place this report in an historical perspective and to provide background information, past regulatory reform initiatives in New Jersey are detailed, along with a treatise on the “nuts-and-bolts” of the rule-making process as it currently stands.

### III. SUMMARY OF RECOMMENDATIONS

#### I. LEGISLATIVE

- A. Improve the administrative rule-making process under the “Administrative Procedure Act” by permitting rule proposals to be changed based on public comment, adopting reforms to the system of administrative adjudications, and altering the “sunset” requirements for rules.
- B. Provide for new and expanded powers to combat unfunded mandates, including expanding the number of groups who can bring complaints before the Council on Local Mandates, and enlisting the assistance of the State’s law schools to undertake a review of all mandates presently contained in the statutory law and administrative code.
- C. Through legislation or Executive Order, as appropriate, eliminate unnecessary boards, task forces, study commissions and councils. New standards should be adopted to guide the State with respect to the creation of boards that administer regulated professions.
- D. Affordable housing dictates remain a problematic area for State policy-makers. The Red Tape Review Group, given its limited mandate and compressed timeframes, recommends that the Legislative and Executive Branches continue efforts to arrive at a more effective affordable housing policy that is less burdensome for municipalities and taxpayers.
- E. The burdens of the Civil Service system were testified to at length. While this topic exceeds the mandate of the Red Tape Review Group, the Group acknowledges efforts to rationalize titles underway at the Civil Service Commission and provide a means for a municipal “opt-out.”
- F. Binding Interest Arbitration was testified to at length, but this topic exceeds the mandate of the Red Tape Review Group and requires further review.
- G. Unfunded mandates for both K-12 and higher education should be examined.

#### II. REGULATORY

- A. State agencies should adopt the “Common Sense Principles” for rule-making.
- B. State agencies should proceed with rule rescissions and modifications pursuant to the 90-day review of rules.

- C. State agencies should proceed with rule rescissions and modifications pursuant to the 180-day review of rules.
- D. Shortcomings of the Regulatory System should be addressed such as:
  - 1. Archaic and anachronistic rules;
  - 2. Rules that offend common sense; and
  - 3. Rules that over-reach.

### **III. POLICY**

- A. State agencies should adopt a culture change that results in a more customer-service oriented mentality.
- B. Endorse the creation of a new model for job creation/economic development under the supervision of the Lieutenant Governor. A central element of this model will be the creation of “one-stop” shopping for State permits for significant economic development projects.
- C. Adopt improvements to State Information Technology systems that result in convenient and efficient access across State agency organization boundaries to integrated services for businesses.
- D. Recognize that the Office of Smart Growth and the State Planning Commission must become a key strategic player in State Government, so that permitting and capital investment decisions can be coordinated with planning.
- E. Establish an ongoing, transparent and bi-partisan Red Tape Review Group to succeed the 90-day Red Tape Review Group.
- F. Rescind Executive Orders that confuse or impede economic development goals.

## IV. SYNOPSIS OF THE RED TAPE REVIEW PROCESS

### A. The Gubernatorial Transition Period -- November 2009 to January 2010

Following the 2009 general election and prior to the inauguration, the gubernatorial transition conducted a series of meetings on regulatory reform and mandate relief. Members of the Transition Team (the “Team”) conducted fact-finding through a series of roundtable discussions and a review of regulations to organize the formal work of the Red Tape Review Group that was ultimately established on the Administration’s first full day in office.

#### *1. Input Sessions*

The Team first met on November 10, 2009, and held 18 planned input sessions over the following seven weeks. To kick-off its series of meetings, the Team met with local government officials at the New Jersey State League of Municipalities Annual Conference on November 19, 2009 in Atlantic City. Other large group meetings that included a variety of stakeholders were held at the Eagleton Institute, Montclair State University and the South Jersey Chamber of Commerce. In addition, the Team conducted 14 smaller discussion groups with business people from start-ups to major corporations, educators, healthcare professionals, lawyers, local government officials and environmentalists. The goal of these sessions was to gather opinion from as diverse a cross-section of New Jersey as possible (in a short period of time), on the regulatory policies and processes that impede job growth and retention and burden New Jersey’s economy the most. In addition, the Team sought out local officials to further explore the topic of “unfunded mandates” in an effort to gather information on the most burdensome dictates imposed by regulatory agencies.

As the Team delved into its meeting schedule, certain recurring themes became obvious. Generally, stakeholders expressed the frustration that the rule-making process employed by State agencies has too many dysfunctional parts. These broken parts could be categorized by 10 issues:

- The State policy toward affordable housing and the dictates of the Council on Affordable Housing (COAH) were badly broken and in need of substantial reform;
- Civil Service provisions were frustrating efforts of public entities to share services and reduce spending;
- The culture of the bureaucracies at numerous State agencies was not “customer-service” oriented;

- Unfunded mandates on local governments and boards of education were contributing to increasing property tax rates;
- The process by which State agency permits are administered is broken;
- State Government agencies are plagued by poor information technology systems and infrastructure, which in turn compounds delays in the regulatory process;
- Tax regulations are needlessly complex and often do not recognize how businesses operate in the “real world”;
- Business information reporting requirements are redundant, outmoded, unnecessary or are in conflict with federal law or policy;
- While the State Development and Redevelopment Plan espouses important concepts to guide State growth, the document is not the comprehensive document that should guide regulatory decision-making and State agency capital investments. Moreover, State agencies have acted autonomously to adopt individual plans that impact State growth policies that may be unmoored from the larger State Plan.

## *2. Transition Team Review of Other State Efforts at Regulatory Reform*

The Team also studied reform efforts in other states in an attempt to learn from their failures and successes. In fact, many of the reforms recommended by other states were similar to those proposed in earlier regulatory reform groups in New Jersey, if not implemented. Indeed, in some cases reforms proposed in other States were already “on the books,” although not widely practiced in New Jersey. The Team examined efforts to eliminate red tape and create an attractive climate for job creation and investment in Texas, Virginia, Ohio and Pennsylvania.

a. Texas -- Lieutenant Governor William “Bill” Hobby, Jr. led the major reform effort in Texas in the mid to late-1970s. The “Texas Joint Advisory Committee on Government Operations” worked for 13 months and offered 113 recommendations in its final report.<sup>4</sup> Some key recommendations that the Committee also put forth included a mandatory sunset provision

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<sup>4</sup> The Joint Advisory Committee on Government Operations (the Hobby Commission) was established in 1975 (Senate Bill 319, 64th Legislature, Regular Session), to analyze and improve the operations of state government. The Commission, chaired by Lieutenant Governor William Hobby, consisted of 18 legislators and private citizens, including the Secretary of State. The Commission divided itself into seven subcommittees to gather data before it issued its final reports with recommendations to the governor and the legislature in 1977.

for agencies and commissions, an ongoing review process for incorporation into day-to-day operations, and federal supremacy in rules where there is overlap with State jurisdiction. The Committee focused on process, not product, and from a “macro” perspective analyzed agency programs with the following guidelines:

1. What is the need for this program or service?
2. Can the effectiveness or efficiency in the delivery of services be improved?
3. Are similar services being provided in more than one agency to respond to similar needs, problems or target groups?
4. Can the services be provided at lower cost without hampering their effectiveness?
5. Can this service -- or improved service -- be provided at lower cost or more effectively by modifying its delivery or organizational framework?

b. Virginia -- The Commonwealth of Virginia’s efforts on red tape reform are led by Lieutenant Governor William T. Bolling. On June 11, 2009, the “Attorney General’s Government and Regulatory Reform Task Force” issued a report which reviewed over 8,700 pages of regulations impacting Virginians, acted upon four significant legislative proposals which were ultimately approved by the Virginia General Assembly, and made approximately 350 recommendations for change to affected state agencies.<sup>5</sup>

Many of the recommendations from the Virginia report were designed to promote entrepreneurship and the development of small businesses and included a recommendation to implement web-based “One-Stop Small Business Permitting.” As described later in this report, the New Jersey Office of Information Technology (OIT) has developed a similar concept on a smaller scale, and will expand the application to satisfy goals of both the Red Tape Review Group and the New Jersey Partnership for Action. The Virginia report encouraged agencies to implement a “small-business impact statement” in the administrative rule-making process, which is akin to the Regulatory Flexibility Act in New Jersey. The Virginia task force recommended that state agencies be required to assess alternatives before proposing new regulations and must periodically review existing rules and regulations by following the checklist that we have duplicated below. The review must take into consideration:

1. The continued need for the rule;
2. The nature of complaints or comments received concerning the regulation from the public;
3. The complexity of the regulation;

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<sup>5</sup> The Final Report of the Attorney General’s Government and Regulatory Reform Task Force can be accessed at [http://www.vaag.com/PRESS\\_RELEASES/AttorneyGeneral\\_web.pdf](http://www.vaag.com/PRESS_RELEASES/AttorneyGeneral_web.pdf)



4. The extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and
5. The length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

c. Ohio -- Lieutenant Governor Lee Fisher of Ohio led that state's economic development effort and was a huge proponent of the triumvirate of education reform, tort reform and tax reform to foster an attractive climate for employers and employees. Ohio also focused its job creation efforts on the "new economy" space for clean/green energy. Lieutenant Governor Fisher reached beyond the other 49 states and heavily marketed its improved business climate internationally; Virginia also established offices around the world as part of its outreach. In response to demands for a higher level of government accountability, each State agency must meet with the Governor to develop its own goals that would be consistent with the Administration's. Once the agency determined its goals, it identified metrics by which it could measure progress toward those goals. Those metrics are posted on Ohio's website so that taxpayers can track the progress. The Red Tape Review Group suggests that this could be an additional step toward increasing government transparency in New Jersey.

d. Pennsylvania -- Pennsylvania is widely praised for its efforts to eliminate bureaucracy, including the concept of one-stop-shopping. The Commonwealth has used aggressive marketing tactics to lure businesses to that State. As is the case in Ohio, Pennsylvania invests public funds in new business ventures and funds projects that have historically provided its taxpayers with a high return on investment. The state has emphasized education and urban renewal. To optimize its responsiveness to business, Pennsylvania has organized its outreach regionally.

### *3. Regulatory Review and Freeze*

As of the November 16, 2009 publication of the *New Jersey Register*, the Office of Administrative Law tallied 25,746 of administrative rule text pages in the New Jersey Administrative Code, comprising 925 Chapters of rules in 27 Titles. During the final phase of transition-related activities, Team staffers undertook the task of analyzing proposed rules (totaling approximately 800 pages of the New Jersey Administrative Code) that were pending on January 19, 2010 to determine which rules could be frozen. Governor Christie had promised during the 2009 general election campaign that proposed rules and regulations would be frozen and subjected to a review by a bi-partisan Red Tape Review Group. As a result of the staff's review and analysis, it was preliminarily determined that 156 proposed rules could be frozen, while another 67 proposed rules should be permitted to proceed to adoption.<sup>6</sup> This research

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<sup>6</sup> As a result of proposed rule expirations and rule adoptions the conclusion of the Corzine Administration, the number of rule proposals appearing in the *New Jersey Register* that were ultimately set forth in Executive Order No.

provided the information needed for Governor Christie to issue Executive Orders No. 1, 2, and 3 on January 20, 2010, thus laying the groundwork for the formal work of the Red Tape Review Group.

B. Immediate Post-Inauguration Period/Issuance of Executive Orders -- January to February 2010

On January 20, 2010, Governor Christie signed a series of Executive Orders designed to cultivate a new approach to administrative rule-making. Executive Order No. 1 (2010) suspended or “froze” 128 proposed administrative rules and regulations and prohibited the promulgation of new rules and regulations by State agencies for 90 days. The order provided that any proposed rule or regulation published in the *New Jersey Register* on January 20, 2010 was suspended for the 90-day period. In addition, any proposed rule that had been transmitted to the OAL but had not been published in the Register would also be suspended. The provisions of the Executive Order did not apply to any proposed or contemplated rule if the failure to adopt the rule would:

- Adversely impact public safety or security;
- Adversely impact the public health;
- Prejudice the State of New Jersey with respect to the receipt of monies from the federal government or impede the ability of the State to obtain certifications from the federal government;
- Prevent the application of powers, functions and duties essential to the operations of the State agency in question; or
- Adversely impact compliance with any judicial deadline.

Executive Order No. 1 also extended the expiration date of any administrative rule or regulation that would have otherwise expired during the 90-day freeze period until April 18, 2010 and until such time as the extended rule was re-adopted pursuant to the provisions of the “Administrative Procedure Act.”

Executive Order No. 1 froze proposed administrative rules and regulations to allow State agencies to comply with the provisions of Executive Order No. 2 (2010). That order established “Common Sense Principles” for State agency rule-making designed to make the regulatory process understandable, consistent and predictable. Among the reforms mandated by the order,

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1 (2010) totaled 198. Of that number, 128 were suspended or “frozen,” while an additional 70 were not. Added to this number were 23 notices of rule proposals and 5 temporary adoptions involving the Casino Control Commission under review for publication at the time E.O. No 1 took effect.

all State agencies are required to implement pre-proposal and stakeholder processes, so that proposed rules and regulations can be examined by knowledgeable persons in the private sector and academia. Although the use of pre-proposals and stakeholder processes are used in certain circumstances by some State agencies, their use is neither uniform nor widespread.

Executive Order No. 2 also mandated that State agencies adopt “time of decision” rules that require that a permit or approval application shall be governed by the administrative rules and regulations that are in effect when the permit application is filed, except in those cases where otherwise specifically provided for in State law. This provision is designed to prevent State agencies from “moving the goal posts” by constantly changing the requirements for permits and applications while the permit or approval application is pending.

The “Common Sense Principles” also call upon State agencies to adopt regulations that permit waivers from strict compliance, provided that the granting of such waivers is not inconsistent with the core mission of the State agency in question. Policies permitting waivers are necessary in order to avoid situations where compliance with one agency permit program results in non-compliance with the requirements of a different permit program. Also, State officials would have greater ability to use their good judgment in those situations, rather than falling back upon the response that while a waiver may be eminently sensible, “the rules don’t allow it.” The order further directs State agencies to publish their policies for granting waivers on their respective agency websites.

The order also directed State agencies to employ the use of cost/benefit analyses when promulgating rules and regulations. In some instances, the “socio-economic statement” required for rule proposals pursuant to the Rules for Agency Rulemaking is not comprehensive, or fails to take into account legitimate information and scientific data developed by federal government or agencies in neighboring jurisdictions.

Executive Order No. 2 also requires State agencies to detail and justify every instance where a proposed rule exceeds the requirements of federal law or regulations. It further directs that when promulgating new rules, State agencies should not exceed federal standards unless required to do so by State statutory law or only in those cases where it is demonstrated that the enhanced requirements are necessary to achieve a New Jersey-specific policy goal.

Executive Order No. 3 (2010) established a bi-partisan “Red Tape Review Group” chaired by Lieutenant Governor Guadagno to begin a focused and short-term process of changing New Jersey’s approach to regulation by reviewing the 800 pages of frozen rules and regulations to determine which ones negatively impact New Jersey’s economy. State agencies were to be guided by the “Common Sense Principles” articulated in Executive Order No. 2 informed the deliberations of the Group and provided a guide to State agencies for reviewing

their pending rules and regulations. In addition to its mandate to review pending rules and regulations frozen by Executive Order No. 1, the Group was tasked by Governor Christie with the review of all operative Executive Orders from prior administrations, so that orders that impeded economic growth and the creation of jobs could be rescinded or modified.

The Group met informally for the first time on February 4, 2010. Lieutenant Governor Guadagno's staff, the staff from the Legislature and the Office of the Governor's Counsel began work in advance of that meeting and have met at least weekly thereafter.

### C. Red Tape Review Public Meeting Period -- March through April 2010

With the cooperation of Executive Branch departments and agencies, consultation with the leadership of both Houses and both caucuses of the Legislature, the Group undertook a series of public meetings and working sessions to hear testimony on the regulations frozen pursuant to Executive Order 1, and other issues relating to regulatory reform. Individual legislative members of the Group also conducted their own hearings on regulations and mandates that impact New Jersey's economy.

To gather ideas from stakeholders and to conduct as transparent a process as possible, the Red Tape Review Group decided to hold three public meetings over the course of the 90-day period culminating on April 19, 2010. The meetings were purposefully held outside of the State Capitol in Trenton and were scheduled for locations in the southern, central and northern portions of the State. The locations were: Rowan University, Glassboro, Gloucester County on Tuesday, March 2, 2010; Brookdale Community College in Middletown Township, Monmouth County on Tuesday, March 9; and at Montclair State University, Montclair Township, Essex County, on Tuesday, March 23. The public meetings were arranged around three major topics, respectively: "Reforming the provisions of the 'Administrative Procedure Act,'" "Eliminating Unfunded Mandates," and testimony on "Rules that violate the 'Common Sense Principles' on Rule-Making" set forth in Executive Order No. 2 (2010).

The first two hearings lasted for approximately three and a half hours and since the last meeting concerned the broadest topic, it was five-hours in duration.<sup>7</sup> At the initial meeting, given the relatively technical nature of the subject matter, invited witnesses testified and responded to questions with a 20-minute time limit. Subsequently, invited witnesses testified with a 10-minute time limit and all other speakers were given 5 minutes to testify, followed by any questions posed by the Group members. Almost all witnesses submitted written testimony and constituents who did not testify also submitted testimony to be part of the public record.

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<sup>7</sup> The complete testimony of the public meetings of the Red Tape Review Group is available on the Department of State web site at <http://www.state.nj.us/state/>

*1. Rowan University -- March 2, 2010*

At the Rowan University meeting, the Red Tape Review Group first heard testimony that detailed procedures at the Office of Administrative Law. Lawyers and other experts in administrative law commented as to whether or not Administrative Law Judges should be given final decision authority, subject to appeal in the Superior Court Appellate Division, in contested cases under the “Administrative Procedure Act.” It was noted that in most State departments and agencies now, the State agency head may override the decision of the administrative law judge, which witnesses believed added an unnecessary and undesirable level of uncertainty to the process.

The issue of permitting substantive changes to rule proposals based upon public comment during the rule-making process, including alternatives to the present system, was also discussed in detail. State departments and agencies, as well as stakeholders in the rule-making process, have complained that agencies are hesitant to incorporate changes to rule proposals because they would be compelled to restart the process if a change can be construed as “substantive.” Many witnesses argued that the failure of agencies to adopt changes based on comment turned the comment process into a wasted exercise in which rules were promulgated by State agencies despite the knowledge of their practical flaws.

Witnesses also addressed whether or not the five-year “sunset” provision for most regulations set forth in the “Administrative Procedure Act” is optimal. A total of 26 witnesses registered to speak. The Red Tape Review Group and staff also held a meeting after this hearing with senior personnel from the Office of Administrative Law to obtain further information on the topics raised at the Rowan public meeting.

*2. Brookdale Community College -- March 9, 2010*

At the meeting held at Brookdale Community College, a group comprised mostly of elected county and municipal officials and educators testified on the most burdensome mandates imposed on them. In addition, 58 members of the general public signed up at the meeting, but not all spoke. The Chairman of the Council on Local Mandates explained the power of that body in ruling when an unconstitutional unfunded mandate has been imposed on a local entity. The Red Tape Review Group was surprised by how few representatives from public entities were aware of the Council on Local Mandates as a forum to challenge unfunded mandates. Clearly the Council has been underutilized. The local officials cited COAH, binding interest arbitration, the DEP Stormwater Management Program and compliance with the records request provisions of the “Open Public Records Act,”<sup>8</sup> (OPRA) as their most burdensome local mandates. The most common concern expressed by educators was the need to implement modifications to the NJ Quality Single Accountability Continuum (QSAC) provisions. Both sets of public entities requested relief from what they considered to be the unduly restrictive provisions of Civil

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<sup>8</sup> N.J.S.A. 47:1A-1 et seq.

Service regulations, which they contend present an obstacle to efforts to implement shared service agreements. While outside the scope of regulatory relief on an administrative level, many local officials requested relaxation from the requirements of the prevailing wage, which they contend raises the costs of public projects and even prevents private citizens from donating their services to their communities.

### *3. Montclair State University -- March 23, 2010*

The Montclair State University public meeting was well attended and the witnesses represented a cross-section of individuals, individual businesses, industry groups, unions, environmental groups, educators, elected officials and healthcare professionals. More than 75 individuals attended the hearing. Testimony ranged from individual complaints about work rules or permitting, to suggestions for long-term studies that assess the effectiveness of existing programs, to the elimination of unnecessary task forces commissions, and licensing boards for regulated professions. Whether supportive of regulations or not, most speakers agreed that less paperwork and greater leveraging of information technology could have at least mitigated many of the common regulatory roadblocks.

Speakers at the Montclair meeting also testified that outdated and unevenly applied rules in the telecommunications industry unintentionally discourage cutting-edge hi-tech companies from calling New Jersey home. Among the most striking examples of rules that violate common sense principles informed the lack of flexibility for hiring in special needs schools. As one witness testified, “[W]e have one high school student who spends each day crawling on all fours and roaring like a bear ... [h]e often relates to other children in a menacing manner.” To comply with regulations, this special needs school is forced to spend scarce resources on teachers for biology and world languages rather than on specialists who can deal with basic behavioral and communication problems.

#### D. Legislator Meetings

These larger public meetings were not the only venues for public participation, and were complemented by meetings held by the legislative members of the Red Tape Review Group. The Assembly Regulatory Oversight and Gaming Committee chaired by Assemblyman Burzichelli held a hearing on February 8, 2010, where the committee took testimony from invited speakers concerning the regulatory process in New Jersey and problems that it has presented for businesses in the State.<sup>9</sup> In addition, the Assembly Regulatory Oversight and Gaming Committee held a meeting on March 4, 2010, to hear testimony from the public

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<sup>9</sup> The testimony from the committee meeting can be accessed at: [http://www.njleg.state.nj.us/MEDIA/OLS\\_MEDIA\\_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0208-0200PM-M0-1.wma!](http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0208-0200PM-M0-1.wma!)

concerning the feasibility of prohibiting a State agency from filing with the Office of Administrative Law a notice of proposal or notice of adoption for any rule that would exceed federal standards or requirements, unless specifically authorized by State law. Also, the committee considered legislation to require that all State agency rules be published in the *New Jersey Register*, and that the use of regulatory guidance documents be prohibited unless specifically authorized by State law.<sup>10</sup>

Assemblyman Rumana held a public meeting in his 40th District (Bergen/Passaic/Essex Counties) on local mandates. Finally, Senator Oroho held a meeting in Sussex County with a similar open agenda concerning regulations that defied common sense principles.

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<sup>10</sup> The testimony from the committee meeting can be accessed at:  
[http://www.njleg.state.nj.us/MEDIA/OLS\\_MEDIA\\_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0304-0200PM-M0-1.wma!](http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0304-0200PM-M0-1.wma!)

## V. LEGISLATIVE RECOMMENDATIONS

### A. Reform the “Administrative Procedure Act.”

*1. State agencies should be permitted to adopt changes to proposed administrative rules based upon public comment.*

Many witnesses testified before the Red Tape Review Group in order to give the group a critique of the State’s rule-making process. There are a number of causes which lead to the initiation of rule-making in the State, including: implementation of new legislation, policy changes, executive orders, court decisions, rule-making petitions from interested parties, emergent issues and federal requirements. Significantly, any revision, rescission, or replacement of an existing rule is considered a new rule that must be submitted to the entire rule-making process.<sup>11</sup> Moreover, all rules have a lifespan of five years, and must be readopted under the rule-making process at the expiration of that time.<sup>12</sup>

Once a State agency has prepared a proposed rule, the first step in the review process is the Smart Growth Ombudsman.<sup>13</sup> The Smart Growth Ombudsman reviews proposed rules or substantive changes in current rules to determine whether the rules are consistent with the State Development and Redevelopment Plan.

Following that review process, pursuant to the “Administrative Procedure Act,” public notice of the rule proposal must be given via publication in one of the 24 annual volumes of the *New Jersey Register*. To be included in a given volume of the *New Jersey Register*, the proposal typically must be submitted to the Office of Administrative Law approximately one month prior to publication. The Office of Administrative Law reviews the notice of proposal to ensure that it is in compliance with the requirements of the “Administrative Procedure Act.” The Notice of Proposal must be accompanied by ten statements which summarize the proposed rule changes, nine of which are required by statute, and one of which is required pursuant to an Executive Order issued during the administration of Governor McGreevey.<sup>14</sup> The required impact statements are: a social impact statement, an economic impact statement, a federal standard statement, a jobs impact statement, an agricultural industry impact statement, a regulatory flexibility statement, a housing affordability impact statement, a smart growth impact statement, a smart growth development impact statement, a small growth impact statement. Once a rule

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<sup>11</sup> N.J.S.A. 52:14B-4.9

<sup>12</sup> N.J.S.A. 52:14B-5.1

<sup>13</sup> N.J.S.A. 52:27D-10.2, et seq.

<sup>14</sup> See Executive Order No. 4 (2002) (McGreevey) at <http://www.state.nj.us/infobank/circular/eom4.htm>



proposal is published in the *New Jersey Register*, there is a 60-day comment period. An agency must conduct a public hearing on the proposal, if requested to do so by the Legislature or a governmental agency or subdivision, or if sufficient public interest is demonstrated.

Following the comment period, an agency may adopt its proposal by filing a Notice of Adoption with the Office of Administrative Law. The notice of Adoption must summarize and respond to the concerns raised during the comment period. Minor changes to the proposed rules received during the comment period can be adopted. The publication of the Notice of Adoption in the *New Jersey Register* marks the effective date of the new rules.

The testimony received by the Red Tape Review Group identified a number of problematic issues with the State's current rule-making process. One of the most significant concerns emphasized in the testimony is the fact that it is overly difficult for a State agency to alter a rule proposal based upon public comment, even when the agency receives valid comments which raise legitimate concerns, improve the rule proposals, or expose significant flaws. State agencies are often just as frustrated as stakeholders by this state of affairs. The Rules of Agency Rule-making provide that when a State agency determines to make changes to a proposed rule which are so substantial that the changes effectively destroy the value of the original notice, the agency must give a new notice of proposal and provide the public with an opportunity to be heard.<sup>15</sup> In determining whether the changes in the proposed rule are so substantial, consideration is given to the extent that the changes to the proposal:

- “Enlarge or curtail who and what will be affected by the proposed rule;”
- “Change what is being prescribed, proscribed or otherwise mandated by the rule;”
- “Enlarge or curtail the scope of the proposed rule and its burden on those affected by it.”

According to the testimony received by the Red Tape Review Group, over time, the notion of what constitutes a substantial change has been construed by State agencies in the most narrow and conservative fashion. It would appear that State agencies have erred on the side of not making even relatively minor changes to proposed rules, out of fear that the changes may be construed as substantial and potentially lead to the entire rule proposal being challenged for failure to comply with the proper notice procedure. Moreover, given the attendant additional work and delays associated with the process of re-proposing rules, agencies frequently disregard this option as well. As a result, State agencies may ignore valid and legitimate comments altogether in an effort to finalize the current incarnation of a set of proposed rules, regardless of deficiencies that have been identified.

Therefore, the testimony reflected that the public comment process is effectively turned

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<sup>15</sup> N.J.A.C. 1:30-6.3

into an exercise where public opinion is solicited on proposed rules and then cannot be incorporated into the rule-making process. This predicament where form often outweighs substance is in need of reform.

The Red Tape Review Group recognizes that the requirements of the “Administrative Procedure Act” are established in an effort to protect the real and legitimate constitutional due process rights of the citizens of this State. These protections cannot be ignored or disregarded in the name of efficiency. However, finding a middle ground is necessary. The Red Tape Review Group believes that the tension between an efficient rule-making system that places real and substantial weight on the public’s comments and concerns and a diligent rule-making system that protects the constitutional due process rights of the public to speak to legitimate issues upon fair notice, is not irreconcilable. Indeed, the Red Tape Review Group notes that both the federal government and other states have been able to satisfactorily resolve this tension.<sup>16</sup> Accordingly, the Red Tape Review Group recommends that the “Administrative Procedure Act” be revised to permit State agencies to adopt substantive changes to proposed rules without needing to undergo the entire rule-making process anew, provided that an additional public comment period is provided prior to the altered rule taking effect.

*2. Amending current law to mandate that the decisions of Administrative Law Judges be considered “final agency action” in contested cases is not being recommended at this time; however, a series of immediate reforms to the system of administrative adjudications should be implemented.*

The Red Tape Review Group also considered the authority of Administrative Law Judges and their role within the State’s administrative law process. The Office of Administrative Law and Administrative Law Judges were created by the Legislature as a result of an amendment to the “Administrative Procedure Act” in 1978. Administrative Law Judges are the preliminary adjudicator for determining challenges to agency actions. When a challenge to an agency action is brought, the Administrative Law Judge is responsible for conducting hearings, assessing credibility, making factual findings, and making a preliminary decision on that challenge. The preliminary decisions are then submitted to the head of the government agency for a final decision, to approve, reject, or modify the Administrative Law Judge’s preliminary ruling.

Prior to the creation of the Office of Administrative Law, agency adjudications were typically conducted internally by employees of the agency itself. This situation fostered a perception of agency bias, which undermined the legitimacy of those proceedings. The creation of the Office of Administrative law was intended to bring impartiality, objectivity, and a heightened fairness to agency determinations.

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<sup>16</sup> See Appendix C for a memorandum prepared by the Office of Administrative Law that details the manner in which other jurisdictions address the issue of a proposing agency’s ability to substantively revise a proposed rule.

However, the Red Tape Review Group heard testimony from witnesses who argued that the current system does not go far enough. These witnesses advocated that the decisions of Administrative Law Judges should be the final determination on agency adjudications, subject only to appeal to the Appellate Division of the Superior Court. Specifically, issue was raised with the fact that Administrative Law Judge decisions are preliminary findings that are subject to final approval or rejection by the governmental agency. The witnesses maintained that so long as the head of the governmental agency is still the final arbiter on agency adjudications, the same bias and impartiality concerns predominate over the administrative proceedings – the end result is still that an agency is internally making an adjudication as to the correctness of agency actions taken by an employee of the same agency. It was stressed that this multiple-step process also delays the time frame for obtaining final determinations and adds additional work to the agency's already extensive list of responsibilities. As a potential middle ground, these witnesses suggested that, if the Administrative Law Judge's decision is not treated as a final determination, then the decision should still be entitled to a heightened deference upon the agency's final review of that decision.

The Group received statistical information from the Office of Administrative Law which shed light on the question of how often initial decisions from Administrative Law Judges are overturned by State agency heads. According to the Office, a review of 352 Appellate Court decisions on the Rutgers-Camden Law School website from 2005 onward shows that 70% of the time, the initial decision of the Office of Administrative Law was adopted as a final decision by the Department or Agency.<sup>17</sup> The Appellate Division affirmed 215 of these decisions, or 60% of the cases. The Appellate Division rejected 30 decisions, or 10%, concluding that both the OAL and the agency head erred in their interpretation of the law. In 30 of these instances, or 11%, the Appellate Division overturned the agency head's decision, affirming the initial decision's legal conclusion.

In areas such as Medicaid the affirmances primarily involve true legal interpretation of difficult statutory language. In others, such as DEP, the Civil Service Commission, or the Division of Alcoholic Beverage Control, generally the cases addressed penalty matters. Under the legal review standards, to overturn a penalty, the Appellate Division cannot simply choose a different result, but must conclude that the agency action was arbitrary, capricious and unreasonable.

The Red Tape Review Group recognizes that these witnesses have raised significant and considerable concerns regarding the administrative adjudication process and the role of Administrative Law Judges. However, the Red Tape Review Group is sensitive to the fact that the suggestion raised by these witnesses to remove final agency determination on the preliminary decisions of Administrative Law Judges proposes a substantial departure from the existing

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<sup>17</sup> See Appendix E for a detailed chart prepared by the Office of Administrative Law containing a department-by-department breakdown of how contested cases have been reviewed by the Superior Court, Appellate Division.

principles of governmental authority. Administrative adjudication is a basic regulatory responsibility of each State agency, and that authority composes a significant integral aspect of each agency's overall regulatory authority. While it ultimately may be in the best interest of the State to move this function out of the regulatory responsibilities of State agencies to the Office of Administrative Law, such a reorganization of authority implicates a substantial shift of regulatory authority away from the Executive Branch. As such, the Red Tape Review Group believes that this issue must be examined further.

Nevertheless, the Group believes that there is a series of changes to the administrative adjudication process that should be implemented immediately regardless of the outcome and further deliberation concerning final agency action in contested cases:

a. *Oral Initial Decision* -- The first of these reforms concerns Administrative Law Judge's authority to issue oral decisions. Currently, Administrative Law Judges are required to provide their preliminary decision to the agency in written format. The Red Tape Review Group recommends that Administrative Law Judges be authorized to issue their initial opinion orally, unless the agency requests a written opinion, and only if the parties agree to order a transcript. This is intended to streamline the administrative adjudication process in appropriate cases by allowing Administrative Law Judges to issue oral decisions in appropriate matters.

b. *Checklist Decisions* -- Similarly, the next of these reforms concerns the authority of Administrative Law Judges to issue checklist decisions. The Red Tape Review Group recommends that Administrative Law Judges be authorized to issue their initial opinion in a checklist format in appropriate cases. The determination as to what cases are appropriate for checklist decisions, and the composition of the checklist decision format, should be reached in consultation between the Chief Administrative Law Judge and the individual state agencies. This "checklist" recommendation is intended to streamline the administrative adjudication process in appropriate cases by allowing Administrative Law Judges to issue opinions faster.

c. *Authorize Agencies to Delegate Final Authority* -- As discussed above, the Red Tape Review Group believes that further consideration is necessary regarding treating the decisions of Administrative Law Judges as final agency determinations. However, the Group believes that government agencies should have the ability to delegate the agency's authority to issue a final determination to the Administrative Law Judge, as the agency believes appropriate. Therefore, the Red Tape Review Group recommends that State agencies be authorized to delegate all or some of the agency's final decision-making authority on administrative adjudications to the individual Administrative Law Judges. This recommendation will streamline the administrative adjudication process and lessen the bureaucratic workload on agencies by allowing them to forego final review of the preliminary decisions of Administrative Law Judges.

d. *Rationalize Decision Deadlines* -- Most decisions are due from the Office of Administrative Law in 45 days, but there are variations depending upon the nature of the case.

The Red Tape Review Group recommends that these deadlines be rationalized.

*e. Agency Settlement Programs* -- State agencies should establish settlement programs to compromise penalties unless prohibited by law.

*f. Pre-hearing Conferences/Telephone and Video Conferencing* -- The Red Tape Review Group believes that pre-hearing conferences and telephone motions should be permitted by law and encouraged by the Office of Administrative Law. Additionally, witnesses should be permitted to testify via telephone or through video conferencing.

*g. Electronic Filing* -- The Red Tape Review Group believes that the Office of Administrative Law should be encouraged to convert to an electronic filing system.

3. *The sunset for rules that are being re-adopted without changes should be lengthened to seven years provided that the State agencies subject rule re-adoption to a “decision matrix.” In addition, a new procedure for the adoption of rules without substantive changes should be implemented.*

Governor Byrne issued Byrne Executive Order No. 6 (1978), which dictated that all agency rules must expire or “sunset” within five years unless readopted under the rule-making procedure. This five-year sunset rule was subsequently codified by the Legislature in 2001.<sup>18</sup> Accordingly, at the expiration of the five-year period, every rule must be resubmitted to the rule-making procedure.

The Red Tape Review Group recommends that this rule be revised. The five-year sunset provision is an unnecessarily burdensome requirement for well-established rules. Under this requirement, agencies must undertake the full rule-making process for established rules, regardless of whether any issues have arisen or been identified with the current regulatory scheme. The time period should be extended for rules that are readopted without substantive change. An extension of the sunset time frame for unchanged rules from five years to seven years strikes the appropriate balance.

There should continue to be some periodic review of these rules, even if they are not being changed as readopted. As such, State agencies should be required to complete a “decision matrix” with regard to pending rules that are not being changed. The Red Tape Review Group anticipates that the completion of this decision matrix for rules that are not anticipated to change should result in an extension of the “sunset” for an additional two-year period. The Red Tape Review Group recommends that the “decision matrix” include the following inquiries:

1. *Does the regulation exceed its statutory authority?*

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<sup>18</sup> See Section 12 of P.L. 2001, 5 (N.J.S.A. 52:14B-5.1)

2. *Does the regulation have a bona fide purpose that makes sense in the 21<sup>st</sup> Century?*
3. *Does the regulation contribute to the health, safety and/or welfare of the State?*
4. *Are the benefits to the overall good of the people outweighed by the cost of the regulation to the public and the State?*
5. *Can the regulation be monitored and enforced in a manner that retains the benefit to the State with a lower burden (e.g.-electronic reporting methods)?*
6. *Does the regulation conflict with another regulation on the books?*

This “decision matrix” should be implemented in a manner that will ensure that unnecessary rules are not continued in perpetuity simply because they are not substantially changed. This should eliminate unnecessary rules and regulations from the books in an effort to simplify and streamline New Jersey’s regulatory code.

In addition to extending the chapter expiration date for two years, the Red Tape Review Group proposes that when a State agency proposes to adopt a rule without changes, or with technical changes as defined by the Office of Administrative Law, the agency should file a notice of publication in the *New Jersey Register* at least 30 days in advance of the expiration date of that rule. Upon receipt of public notice from a State agency announcing the agency’s intent to readopt an expiring rule without changes, or with technical changes only, the Office of Administrative Law would publish that notice in the Register and note the new expiration date for the rule in the New Jersey Administrative Code. The re-adoption of a rule with substantive changes would still be required to follow the procedures set forth in current law.

## **B. Local Mandate Reform.**

*1. The Council on Local Mandates enabling statute should be expanded to give organizations other than local governments and boards of education standing to bring complaints before the Council.*

The Group recommends that the enabling statute for the Council on Local Mandates be amended to allow representatives of organizations such as the New Jersey Conference of Mayors, the New Jersey State League of Municipalities, the New Jersey School Boards Association, the New Jersey Association of Counties, or the Garden State Coalition of Schools to file a complaint with the Council on Local Mandates concerning a potential unfunded mandate. In addition, current law should be amended to permit the Council on Local Mandates to authorize similar organizations representing member counties, municipalities, or school boards to file a complaint with the Council.

The Council on Local Mandates is a unique constitutional entity -- a virtual fourth Branch

of State Government -- that is independent of the Executive, Legislative and Judiciary.<sup>19</sup> It was created pursuant to an amendment the New Jersey Constitution approved by voters in November 1995, and an enabling statute that became effective in May of 1996.<sup>20</sup> Under provisions of current law, the Council may only hear complaints filed by municipalities, school districts and counties. Interested groups or individuals may only apply to the Council to appear in a case as *amicus curiae* or “friends of the court.”

The definition of an “unfunded mandate” and the types of laws, rules and regulations that the Council may not consider to be unfunded mandates are set forth in the Constitutional Amendment and the Council Statute. The Council has exclusive constitutional authority to rule whether a State law, rule, or regulation imposes an institutional “unfunded mandate” on boards of education, counties, or municipalities. Under the Constitution, if the Council so rules, the “unfunded mandate” in the law, rule or regulation, ceases to be mandatory in effect and “expires.” Therefore, drafters of laws, rules and regulations must be particularly conscious of introducing actions which may run afoul of the unfunded mandate law. Rulings by the Council are final and not subject to judicial review.

The Red Tape Review Group heard testimony at the Brookdale public meeting which indicated that the Council on Local Mandates has nullified only five statutes and regulations. In addition, a number of witnesses from local governments and boards of education present at the meeting were unaware of the Council’s activities, and its ability to respond to unfunded mandate complaints.

Underutilization of the Council is troublesome because when its powers are brought to bear on an unfunded mandate, the decisions of the Council can have a significant impact for property taxpayers. For example, the Chairman of the Council noted in his testimony that in May of 2000, the Borough of Highland Park board and municipal governing council successfully brought a complaint that struck down a regulation that changed the formula for the funding of charter schools. The Legislature subsequently passed a law requiring the State to pay for the added funding for charter schools. According to the Department of Education, local school districts saved approximately \$54.5 million over eight fiscal years following that decision.

Senate Bill No. 1716 of the 2008-2009 session accomplished the goal of this recommendation, and enjoyed widespread bi-partisan support when it passed the Senate by a vote of 38-0 on December 10, 2009. Legislation of similar substance would fulfill this recommendation.

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<sup>19</sup> N.J. Constit. Art. VIII, Sec. II, para. 5

<sup>20</sup> N.J.S.A. 52:13H-1 et seq.

*2. The Legislature should give consideration to a proposed constitutional amendment to authorize the Council on Local Mandates to seek out unfunded mandates for elimination.*

The Legislature should give consideration to an amendment to the State Constitution to empower the Council on Local Mandates to become a proactive body, rather than an entity that responds to complaints. If such a change can be wrought in a cost-effective manner, and within the limitations of the budgetary challenges faced by the State, New Jerseyans will have enlisted a partner in eliminating the unfunded mandates that drive increases in property taxes.

An amendment to the basic governing document of the State is a matter that cannot be taken lightly; and this recommendation merely calls for an exploration of this topic by the legislative branch. However, testimony before the Red Tape Review Group at the Brookdale Community College hearing indicated that oftentimes municipal governments and local boards of education are unaware of their ability to bring complaints before the Council on Local Mandates. Given the burden of local property taxes, it is prudent for the Legislature to examine whether it is wise to harness the expertise developed by the members and staff of the Council on Local Mandates to review statutes and regulations, whenever enacted or adopted, in order to recommend the repeal or modification of those laws and regulations that place an excessive burden on local units of government.

*3. The Red Tape Review Group recommends a full review all statutory and regulatory mandates and suggests enlisting the cooperation of the State's law schools to assist in a review of unfunded mandates.*

Executive Order No. 4 (2010) created a process to prevent the imposition of new unfunded mandates on the part of State agencies.<sup>21</sup> The Order requires every State agency to analyze their proposed regulations and assess how their rules would impact the operations and budgets of local governments. The Order further directs that no agency may propose a regulation that includes an unfunded mandate without the express approval of Governor Christie or Lieutenant Governor Guadagno.

In addition, before proposing any mandate on local government, State agencies will be required to prepare detailed written reports analyzing and evaluating the fiscal impact of any mandate. Agencies must also solicit information on any proposed mandate from affected local governments, businesses, residents, and public stakeholders and include it in their report. The report shall be submitted to the Lieutenant Governor and be made available to the public. Within 30 days of receiving the report, the Lieutenant Governor would determine whether the proposed regulation would constitute an unfunded mandate, and, if so, make recommendations for changes that would bring the proposal into compliance with the law.

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<sup>21</sup> Executive Order No. 4 (Christie) (2010) <http://www.state.nj.us/infobank/circular/eoindex.htm>



If proposed regulation is necessary to respond to emergent circumstances that threaten the public health, safety or welfare, the agency may suspend the reporting requirement. However, as soon as practicable after the emergency has been addressed, the Lieutenant Governor must reinstate the reporting requirement and give the agency a specific deadline for compliance.

While these tools, along with a reinvigorated Council on Local Mandates, can act to staunch the flow of new mandates, there currently exists no proposal other than the constitutional amendment cited above that would put in place a mechanism to seek out mandates that have already been imposed for elimination or modification. At the Brookdale public meeting, the Group heard testimony from Marianne Smith, the Administrator of Hardyston Township, Sussex County, who compiled a list of mandates imposed from Trenton that impact her community.<sup>22</sup> The “Hardyston List” is arguably the only comprehensive list of mandates that has been composed, and it raises questions regarding the costs of law enforcement training mandates, purchasing requirements, environmental planning, mandatory attendance of professionals at planning and zoning board of adjustment meetings, and other mandates that are imposed on local governments by the State.

A comprehensive review and analysis of the Hardyston List and all other extant unfunded mandates could prove a major benefit to the State’s local governments and school boards -- and, most importantly -- to property taxpayers. For example, a long-term analysis could be undertaken to examine whether some law enforcement training mandates could be altered without compromising public safety would be a worthy enterprise. However, such a project would require a significant investment of time and must elicit expert testimony in order to be successful.

The proposal to amend the State Constitution to empower the Council on Local Mandates to seek out and repeal unfunded mandates could be a vehicle for such a project; but if that proposal is not timely or cost-effective manner, then the Group recommends that the State engage in discussions with the leadership of the State’s law schools to create an internship program for their students -- under the direction of State official and their faculty -- to undertake a comprehensive and orderly review of unfunded mandates in the statutory law and New Jersey Administrative Code. Under such a plan, students could receive solid experience and credit towards their studies, while the State would receive bright and able assistance to move this formidable project along at little cost to the taxpaying public.

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<sup>22</sup> The “Hardyston List” of mandates can be accessed at the New Jersey State League of Municipalities web site at: <http://www.njslom.org/Hardyston-Twp-Mandates-Analysis.pdf>

**C. The Red Tape Review Group recommends the consolidation of defunct and inactive boards, task forces and commissions, as well as a review of regulated professional boards.**

*1. Consistent with the provisions of Executive Order 15 (2010), the Red Tape Review Group supports the consolidation by Executive Order or legislation, as appropriate, of defunct or otherwise inactive boards, task forces and commissions that no longer fulfill their intended purposes, have completed their work, or have not been convened for a prolonged period of time.*

Executive Order 15 (2010) provides, in part, that the heads of each principal department in the Executive Branch identify State authorities, boards, task forces and commissions established in or allocated to their respective departments, and provide a recommendation to the Governor's Office not later than May 15, 2010, regarding whether any of those bodies should continue to exist or be eliminated.<sup>23</sup> The Group gratefully acknowledges the assistance provided by the Governor's Office of the Appointments Counsel, which has compiled a list set forth in Appendix C of this report of boards, task forces and commissions that should be consolidated consistent with Executive Order No. 15. A number of these commissions still require staff work from State agencies and their continued presence often serves to confuse the public.

Appendix C contains list of defunct or otherwise inactive boards, task forces and commissions that either: (1) have not met for an extended period of time (in some cases more than 10 years); (2) were never filled with appointed members; (3) addressed a problem that is no longer an issue; (4) fulfilled their mandates or functions; (5) were absorbed by other boards or commissions; or (6) never issued a final report to indicate their task was complete; and (7) at their creation, were not given a date of terminus. The appropriate department confirmed that each board, task force or commission was no longer in operation.

The Red Tape Review Group therefore recommends that the list of entities set forth in Appendix C to this report serve as a starting point for a discussion of boards, task forces and commissions that should be consolidated by legislation or Executive Order, as appropriate.

*2. In addition, the Red Tape Review Group recommends that pursuant to Executive Order No. 15 (2010) further analysis of approximately 500 remaining boards, task forces and commissions be undertaken.*

Such an analysis should be guided by a "bright line test" that if a board or commission has not met for a reasonable and defined period of time, the board in question is in all likelihood not needed. Also, when the mission of a committee or commission overlaps with that of another, the prospect of a "merger" should be explored.

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<sup>23</sup> See Section 8 of Executive Order 15 (2010) (Christie) at: <http://www.state.nj.us/infobank/circular/eocc15.pdf>

The Red Tape Review Group further recommends that whether created legislatively or by Executive Order, new task forces, advisory councils, committees and commissions be given a termination date or act that would indicate a “sunset” (i.e., “The commission will expire upon completion of its final report.”)

*3. The Red Tape Review Group recommends that a study be undertaken to review whether any of the 41 boards and committees, regulating more than 80 professions and occupations under the jurisdiction of the Division of Consumer Affairs in the Department of Law and Public Safety should be abolished or consolidated.*

Approximately 600,000 New Jersey residents are licensed by such boards. The Group notes that in 1971, the Professional and Occupational Licensing Study Commission, chaired by the then-Senator Raymond H. Bateman, recommended four criteria for use in determining when New Jersey should license professions and occupations. Commonly referred to as the “Bateman Criteria,” groups should be licensed when:

- The unregulated practice can clearly harm or endanger the health, safety and welfare of the public and when the potential for such harm is easily recognizable and not remote or dependent upon tenuous arguments; and
- The public needs, and will benefit by, an assurance of initial and continuing professional and occupational ability; and
- The public is not effectively protected by other means; and
- It can be demonstrated that licensing would be most appropriate form of regulation.

The “Bateman Criteria” were designed to provide effective regulation of a profession or occupation in as simple a manner as possible in terms of efficiency, adequacy and administrative soundness, and the Group endorses a study to ensure that professional boards comply with this criteria.

**D. Affordable housing dictates remain a problematic area for State policy-makers. The Red Tape Review Group, given its limited mandate and compressed timeframes, recommends that the Legislative and Executive Branches continue efforts to arrive at a more effective affordable housing policy that is less burdensome for municipalities and taxpayers.**

The Red Tape Review Group heard a great deal of testimony on the subject of affordable housing policy. This discussion underscored that need to arrive at a new housing policy for the State. However, a recommendation in this regard clearly exceeds the Mandate of the Red Tape Review Group as set forth in Executive Order No. 3 (2010). In Appendix D to this report, there is a detailed explanation of the report of the Housing Opportunity Task Force, which was tasked

with a review of affordable housing policies in New Jersey.<sup>24</sup>

**E. Civil Service reform: The Red Tape Review Group heard overwhelming testimony concerning the burden of the current system, which suggests options for reform, including rationalization of titles and legislation to permit municipalities to “op-out” should be implemented.**

The mission of the Civil Service Commission is to attract, develop and retain a high quality workforce for State, county and municipal governments. The commission also maintains a partnership with management and labor to develop a fair, efficient human resource delivery system rewarding quality, merit and productivity. Efforts by the new Chair/Chief Executive Officer Robert M. Czech to streamline operations are detailed in an Appendix E at the end of this report.

Particularly at the Brookdale meeting on unfunded mandates, local officials testified one after another that they were handcuffed by the present Civil Service system. They complained that not only does the system create delays in resolving personnel decisions, but when municipalities are under pressure to share services and/or merge to avoid property tax hikes, Civil Service can become an insurmountable obstacle.

The Governor has recommended legislation to provide an “opt-out” from Civil Service for municipalities. The Red Tape Review Group notes with approval that a bill<sup>25</sup> sponsored by Assemblyman Burzichelli would permit counties and municipalities to withdraw from the Civil Service system by passage of an ordinance by their governing body. Also, a draft bill circulated by the New Jersey State League of Municipalities would allow local governments to drop out of Civil Service either by adoption of an ordinance or through passage of a referendum. Whatever the specific outcome, overwhelming testimony as to the burdens of the Civil Service system suggest a compelling need for reform.<sup>26</sup>

**F. Binding Interest Arbitration was testified to at length, however, the Red Tape Review Group notes that this topic exceeds its mandate and requires further review.**

The Red Tape Review Group heard testimony from local government officials regarding the use of binding interest arbitration when it comes to public service contracts for police, fireman, teachers and other unionized employees. Under such a system, once a stalemate in negotiation occurs between what is offered by the municipality and what is requested by the union a third party, or arbitrator, is brought in. That person’s decision to break the stalemate is

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<sup>24</sup> See Appendix C. A copy of the Housing Opportunity Task Force report can be accessed at: [http://www.state.nj.us/governor/news/reports/pdf/2010033\\_COAH.pdf](http://www.state.nj.us/governor/news/reports/pdf/2010033_COAH.pdf)

<sup>25</sup> See Assembly Bill 2580, introduced March 22, 2010 by Assemblymen Paul Moriarty and John Burzichelli.

<sup>26</sup> Background information on the testimony relating to Civil Service reform is detailed in Appendix E to this report.

binding.

The Group heard testimony from local officials who complained that historically, arbitrators have assumed the employees are entitled to raises irrespective of whatever external fiscal or economic forces are at play in the municipality. They argued that the decisions of arbitrators are out of sync with the fiscal realities confronting local property taxpayers. They suggested to the Group that revisions to the arbitration system are needed to require the arbitrator to consider the impact of their decisions on other governmental services, the impact on property taxes, and the ability for all costs to stay under a legislatively-established cap. The Governor has proposed reforms along the lines of this testimony in the Fiscal Year 2011 State Budget Recommendation Document.

**G. The Red Tape Review Group notes that overwhelming testimony supports the need to provide relief from unfunded educational mandates.**

At the Brookdale meeting on unfunded local mandates, educational organizations urgently called for a moratorium on new regulations. Witnesses concurred with municipal government leaders on the difficulties imposed by the Civil Service system, and the need for “op-out” provisions, as well as prevailing wage relief.

The witnesses representing K-12 school districts, specifically expressed the need for “last best offer” as a negotiating tool; for improvement in the overall mediation system, in which the economy is a factor; for uniformity in curriculum standards statewide; and for more flexibility with the Department of Education’s Quality Single Accountability Continuum (QSAC) for the evaluation of public school districts. While QSAC requires evaluations every three years, witnesses from school communities testified that high-performing districts should then be evaluated every seven years. Please see Appendix F and the end of this report for the Department of Education’s review of unfunded mandates pertaining to education.

Witnesses from colleges and universities supported the removal of State management from collective bargaining for unionized employees at State college and universities. The State is not the employer of record; nor does it pay these employees’ salary. If colleges and universities cannot gain the power to conduct negotiations, they argue for the right to accept or reject terms proposed by the State for collectively-negotiated contracts that affect college and university employees.

The institutions of higher education recommend empowering State colleges and universities to manage their own workers’ compensation programs and claims for workplace illness and injury. Compensation payments from State colleges and universities to the State have increased 100% in five years. Similarly, health claims from workplace illness and injury increased 146%, from \$500,000 in fiscal 2000 to \$1.3 million a year in fiscal 2005.

The colleges and universities also recommend legislation authorizing the Department of Community Affairs to either contract with private firms directly or delegate the authority to conduct code-related inspections to State colleges and universities.

The Group acknowledges the need to reform additional education mandates, and notes that the Governor has proposed a number of the reforms mentioned in testimony in the Fiscal Year 2011 State Budget Recommendation Document. A description of those issues and potential reforms are set forth in Appendix F of this report.

## VI. REGULATORY RECOMMENDATIONS

### A. “Common Sense Principles” for State Agency Rule-Making/Decisions

After hearing repeated testimony as to how the rule-making process is broken, the Red Tape Review Group listened to testimony support of the “Common Sense Principles” for rule-making laid out in Executive Order No. 2. The testimony before the Group generally viewed those guidelines as transformative to a more user-friendly regulatory environment: Advance notice of rules; time of decision; waivers of strict compliance; cost/benefit analysis; federal supremacy and performance-based outcomes.

The information that was learned from the series of informal discussions on regulatory reform and mandate relief held during the gubernatorial transition period led directly the adoption of the “Common Sense Principals” enumerated in Executive Order No. 2. Those principles, in turn, have already begun to change the way State agencies do business, how they review the regulatory process, and even the substance of the rules and regulations that are adopted.

The results of the 90-day “freeze” on regulations as well as the actions being committed to in the 180-day action items clearly show that the “Common Sense Principles” have had their intended effect. Further evidence of agency culture change can be found by the DEP’s process of re-opening the comment period of each of its suspended rules and undertaking open stakeholder meetings of each. The DEP has committed to ongoing, transparent stakeholder and outreach processes to effectuate the Principals in Executive Order No. 2. Other State agencies should follow suit.

The “Common Sense Principles” are just that, common sense processes and decision making values that will result in better ways of doing business and getting results in State Government. The Principals include engaging in advance public outreach on rules, time of decision requirements, the ability to waive rules in certain instances, employing a cost/benefit analysis on rules, justifying exceeding federal standards and refraining from doing so unless a New Jersey-specific policy goal is being pursued, looking to results rather than process, eliminating rules that are conflicting or that are contrary to legislative intent, promoting transparency and predictability in rules, working to lessen burdens and compliance costs to businesses, promoting compliance over sanctions, and continually seeking process and other improvements.

The Group believes that it is important not to lose sight of the value these “Common Sense Principles” have and the need to integrate them into State agency decision and rule-making. Moving forward we believe that particular attention should be paid to how well each State agency adheres to these principles.

## **B. Results of the 90-Day Regulatory Freeze**

After reviewing their frozen regulations in light of Executive Order No. 2 (2010) and the Common Sense Principles, the departments of Banking and Insurance, Education, Environmental Protection, Labor and Workforce Development and Law and Public Safety withdrew a number of proposals for further evaluation and review, including more in-depth cost/benefit analysis, to solicit additional advice and opinion, to lessen the regulatory burden, or to otherwise allow the regulations to expire. The proposals that have been withdrawn, and an explanation of the actions taken with regard to Executive Order No. 2 (2010) are included in an Appendix G to this report.<sup>27</sup>

## **C. The 180-Day Review of Existing Rules and Regulations**

Executive Order No. 2 directed agencies to review their existing regulations for compliance with the “Common Sense Principles,” just as they were directed to review the frozen proposed regulations. Since there are many more existing regulations than proposed regulations, the agencies were given 180 days to complete this task. The Department of the Treasury is well along in its 180-day review of existing rules and regulations pursuant to Executive Order No. 2 and has suggested that the following rules are candidates for repeal or revision since they create unnecessary red tape or are obsolete. Similarly, the Department of Environmental Protection has undertaken a partial review of existing rules and regulations pursuant to Executive Order No. 2 (2010) and has suggested a series of rules for repeal or revision. Detailed lists of these regulations are attached as an Appendix H to this report.<sup>28</sup>

## **D. Shortcomings of the Regulatory System**

In the course of its deliberations, the Red Tape Review Group heard and received testimony from individuals and groups concerning specific instances where the regulatory system had failed. The Red Tape Review Group, in general, recognizes that regulation serves a necessary, positive purpose in our society and many of the recommendations of the Red Tape Review Group concern the regulatory process, not the product. The Group also understands that rule-making often involves striking a balance between the need to provide specificity and predictability for persons involved in a regulated industry, while at the same time giving State

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<sup>27</sup> See Appendix G for a listing of rule proposals by State agency.

<sup>28</sup> See Appendix H for a listing of regulations by State agency.



officers and employees the ability to apply common sense and their own discretion when appropriate.

However, in some cases rules live beyond their usefulness or cause unintended and even irrational consequences. In the following paragraphs we discuss three categories of regulatory failures and examples of each that were related to the Red Tape Review Group in oral or written testimony: (1) anachronistic rules that served a useful purpose in their day; (2) rulemaking that has unintended consequences or requirements that appear to be simply arbitrary or without purpose; and (3) government overreach that has resulted in nothing but cost, delay and frustration.

The following examples are not related to the Red Tape Review Group's limited mandate, namely the approximately 800 pages of rules that were frozen pursuant to Executive Order No. 1 (2010). Nonetheless, as each State agency continues its 180-day review of existing regulations, the Red Tape Review Group suggests that the agencies in question pay particular attention to the rules set forth below.

1. Examples of Archaic and Anachronistic Rules

*N.J.A.C. 12:90 - Boiler Techs*

The Department of Labor and Workforce Development rules require that apartment boilers be continuously monitored and logged hourly. These regulations were designed for industrial equipment and, when applied to residential apartments, unnecessarily burden maintenance staff without providing added safety benefits. Education professionals had a similar complaint about the black seal boiler tech rule, which served an important safety purpose when boiler technology was far more rudimentary. They suggest that costs could be mitigated if one maintenance worker were permitted to monitor several schools.

*Delays in Obtaining Riparian Instruments*

The complicated review process for tidelands grants has resulted in staggering periods of delay for even routine applications. In the last decade, the average applicant faced an average wait of at least three years to receive a final grant. Many applicants endured longer delays, with some grants lingering for five and even six years. Frustratingly, an appreciable portion of these delay occurred during the routine and uncomplicated process of signing the final grants. During this time, the applicant was faced with a difficult and costly choice: either forego beneficial use and development of the riparian land while the multi-year review process concluded, or tie up funds sufficient to cover all possible compensation to the State in an escrow account. Not surprisingly, many applicants simply abandoned their petitions during this process, stalling both

desperately needed commercial improvements to infrastructure, as well as simple enjoyment of residential lands by State homeowners.

The Lieutenant Governor has recently implemented a pilot program to expedite the tidelands process under which she has executed final sign-off on more than 90 grants totaling almost \$3 million of revenue to the State of New Jersey. Once fully implemented, the new program changes are projected to decrease grant processing time from the three year average to less than one, with many new applications finalized in less than six months. As a result, real estate transactions involving riparian lands will be concluded without unnecessary delay, fees can be collected and deposited into the Fund for the Support of the Free Public Schools more readily, and escrow deposits will be returned in a timely manner freeing private capital for development.

#### *N.J.A.C. 2:48-4.1 - Milk Coupons*

New Jersey is one of a handful of states that continue to regulate minimum retail prices for milk and one of 11 that restrict the use of coupons in retail promotional and marketing campaigns. This regulatory scheme originated during the Great Depression, when the demand for milk fell precipitously and farmers suffered tremendous economic distress. Price support schemes were adopted across the United States to guarantee a supply of this important commodity. New Jersey rightly values its remaining dairy farmers, but this regulation does not seem to be an effective way to protect those farmers and contributes to higher consumer prices. In fact, allowing retailers to offer coupons could co-exist with a price support structure at the wholesale level. Furthermore, coupons may now be used by the National Dairy Promotion Board and by restaurant promotions (see N.J.A.C. 2:48-4.2 and N.J.A.C. 2:48-4.3, respectively)

#### *Sub-Metering of Utilities*

New Jersey is the only remaining state that does not permit the sub-metering of utilities in rental housing units. Sub-metering is a means to monitor and account for utility usage in each unit in a multi-family building that was designed with a single master meter to serve the entire building. Fuel, water, and sewer costs are the top uncontrollable expenses for most professional rental housing providers and sub-metering would promote consumer education, advance conservation efforts and reduce waste. Studies have found water savings upward of 15% after sub-meters were installed to measure individual unit consumption.

#### *Business Registration Certificate (“BRC”)*

This is a regulation administered by the Division of Revenue and applies to all contractors and subcontractors who seek to do business with the State and other public agencies in the State. Proof of registration is also required for licensure with the Casino Control Commission. The present \$3,150 threshold is too low for any business transaction in these

times. In addition, municipalities have the ability to purchase goods and services in amounts not to exceed \$18,000 without public bidding. It would seem logical for the BRC requirement to at least be consistent with the \$18,000 limit.

N.J.A.C. 13:2-27.1 - *E141 Forms*

Although the Prohibition era is history, certain rules for establishments serving liquor still seem rooted in that philosophy. Establishments with liquor licenses are required to fill out E141 Forms that list all employees working on the premises on a given day. Technically, even contract workers like a musical band performing at the establishment should be listed on this form. The regulated community contends that payroll forms combined with employee applications include all the information relevant to assessing qualifications -- including of course, age, as well as criminal background. Due to the high turnover in the restaurant and hospitality industry, failure to have an updated E141 form is among the most common violations and this administrative oversight can result in penalties that include the costly suspension of a liquor license.

2. Examples of Rules that Appear to Offend Common Sense

N.J.A.C. 7:7 and N.J.A.C. 7:7E, respectively - "*Public Access Rules*"

The Group heard testimony at the Montclair State University meeting regarding the implementation of the Department of Environmental Protection (DEP) Public Access Rules. The regulations were adopted in December 2007 as amendments to the rules governing the administration of the Coastal Permit Program and Coastal Zone Management regulations, addressing the public's right to the access and use of tidal waterways and their shores -- including the ocean, bays and tidal rivers in the State. Specifically, the regulations require that as a condition of receiving a permit, on-site, permanent, unobstructed public access to the tidal waterways and shores need be provided on a 24-hour, seven-day-a-week basis. If the access is not practicable, then DEP regulations require that a payment be made to DEP to provide off-site access somewhere else. The Group heard testimony from marina operators, the business community and port operators that the regulations will impact security at military installations, sensitive industrial facilities, commercial ports and harbors and energy facilities.

The Group recognizes that the Public Trust Doctrine establishes the right of the public to use tidal waterways and their shores, including the ocean, bays, and tidal rivers. The doctrine upholds that public rights to tidal waterways and their shores are held by the State in trust for the benefit of all of the people. Further, the Group understands the critical importance of tourism to the economy of New Jersey and the need to protect natural resources and encourage recreational uses of the waterways of this State for swimming, sunbathing, fishing, boating and walking along tidal waterways and their shores. However, it became equally clear that the DEP regulations requiring unfettered access to recreational marinas would impose immense legal

liability, security and safety-related costs on an industry that is essential to the State's tourism economy.

It should be noted that the DEP presently operates six recreational boat marinas through lease or direct State ownership. The Group heard testimony that the DEP staff in charge of those marinas had told the gubernatorial transition team that due to a lack of resources and personnel, DEP-operated marinas could not provide 24-hour access to the public. In other words, the DEP could not afford to comply with the provisions of an administrative rule that it was willing to impose on the private sector.

N.J.A.C. 7:25-4.1 et seq. - *“Exotic Species” Regulations for Bison Raised as Livestock*

Pursuant to regulations adopted pursuant to the “The "Endangered and Nongame Species Conservation Act," N.J.S.A. 23:2A-1 et seq., bison (or American buffalo) is considered an “exotic species,” and their possession by farmers is regulated by the Division of Fish and Wildlife in the Department of Environmental Protection. Farmers raising more than 10 bison are subjected to an annual fee for the possession of such animals, even if they are being used as agricultural livestock and raised for the purpose of being turned into steaks and burgers, rather than for any scientific or exhibition purposes.

N.J.A.C. 18:6-3.4 - *Cigarette “Sales” Tax Misnomer*

One might assume that a sales tax is paid on the total price for an actual transaction, but not necessarily for cigarettes. New Jersey prohibits the sale of cigarettes below the minimum price set by the State. This does not take manufacturers' discounts into consideration, which lower the price that retailers can charge consumers. The Department of the Treasury adopted a rule on December 7, 2009 that requires retailers to pay sales tax on the arbitrary minimum sales tax set by the State, rather than on the actual price paid by the consumer. If the price paid by the consumer, due perhaps to manufacturers' discounts, is lower than the State minimum price, then the retailer must remit the extra sales tax required and, in effect, subsidize the consumer for purchasing cigarettes. This provision has apparently played havoc with the calibration of cash registers at convenience stores throughout New Jersey, and imposes a burden on retailers that they do not encounter in other states.

N.J.A.C. 13:2-13.13 and N.J.A.C. 13:2-19.1, respectively - *Wine Tasting in Restaurants*

The Group heard testimony regarding Division of Alcoholic Beverage Control (ABC) regulations on wine tastings. The Group heard testimony that restaurants which currently hold on-premise consumption licenses and are, therefore, able to responsibly serve wine as part of wine tasting dinners, are being subjected to regulation in the same manner as wine tastings that occur in liquor stores.

N.J.A.C. 13:28-1.1. et seq. - *“Sweet & Sassy”*

At the Montclair State University meeting, Red Tape Review Group heard from a franchisee that employs 34 people and is ready to close her business in New Jersey because the regulatory environment will render it uneconomical. “Sweet & Sassy” is a salon, store and party place for young girls. Licensed stylists work in the salon area. In the party area, typically, high school girls act as party coordinators for younger girls. The older girls lead the group in singing, dancing, arts and crafts, opening up cards and presents and eating birthday cake. They also pin the party-goers’ hair into “updos” at the start of the party and pat light glitter make-up on their faces, which takes approximately five minutes for each partygoer. According to testimony received by the Group, no brush, implements or equipment that must be sanitized is involved in these activities. The main responsibility of the party coordinators is to lead the group in activities. The Board of Cosmetology in the Department of Law and Public Safety warned the proprietor that licensed stylists must apply the make-up and perform the up-dos. The Board also fined Sweet & Sassy \$300 for each high school girl engaged in these activities, which, of course, becomes part of the public record. The Board strongly suggested that the use of high school students working as program coordinators be discontinued and replaced with cosmetology and hairstyling students with student permits (senior work permit), that have completed a minimum of 600 hours of training in a vocational school or proprietary school licensed by the Board. The Group recognizes the legitimate need to ensure that regulatory requirements for decontamination, sterilization, sanitation and awareness of communicable, contagious and infectious diseases are maintained. It should be noted, however, that this franchise business operates in 17 other states, and that these regulatory issues have only been encountered by the franchisee that operates in New Jersey.

### 3. Examples of Rules Where State Regulators Overreach their Authority

N.J.A.C. 13:34-11.2b, N.J.A.C. 13:34-13.1a 2, b and c - *Counselor Licensing*

The Board of Marriage and Family Therapy adopted rules regarding the licensing of professional counselors. The regulations were apparently not adopted to address an existing problem and the extant counseling programs at New Jersey’s institutions of higher education are well-respected and have produced graduates who have gained licensure in professional counseling. Unlike those of any other state professional counseling licensing board, the new regulations mandate a CACREP-accredited degree as the sole criterion for licensure. (CACREP accreditation takes three to ten years). In fact, only one-third of counseling programs are accredited by CACREP nationally and just 11% of those are 60-credit Mental Health Counseling programs. With one exception, no other boards in New Jersey require an applicant to have graduated from a discipline-specific accredited program. Existing programs at New Jersey institutions would be decimated and the number of applicants for licensure from New Jersey, other states without CACREP accreditation, and re-entry professionals would be curtailed. As a

consequence, consumers would have less choice (particularly consumers in underserved communities) at probably greater cost.

N.J.A.C. 7:7E-8.14 - *Wildwood Parking/ CAFRA*

In concert with DEP, the City of Wildwood, Cape May County, updated its Municipal Master Plan and Land Use Ordinances to lay the foundation for urban redevelopment and year-round tourism. To permit construction of the necessary hotel accommodations for the State-sponsored Wildwood Convention Center, the city amended its Land Development Ordinance to permit high rise structures in July 2005. Wildwood required 0.8 parking spaces for each one-bedroom residential unit, 1.3 spaces for each 2-bedroom unit and 1.9 spaces for each 3-bedroom residential unit. DEP required 2 parking spaces per residential unit, however. Furthermore, DEP defined a lock out unit as an additional residential unit requiring another 2 spaces. Therefore, a base hotel unit with a lock out option required 4 parking spaces. The cost of construction and these unnecessary parking spaces could not be supported by projected revenues. After negotiations, DEP agreed to revise the parking requirement to 1 parking space for units up to 650 square feet in size and the proposed Coastal Zone Management Rule Amendment – Traffic Rule was published in the *New Jersey Register* on January 20, 2009. However, the Traffic Rule amendment was never approved.

## VII. POLICY RECOMMENDATIONS

**A. The Red Tape Review Group endorses the adoption of measures to ensure a “Culture Change” in State Agencies to fundamentally change how they view and treat the public with whom they interact, how they measure “success,” and the transparency in how they operate.**

The Red Tape Review Group heard extensive testimony that the culture of State agencies is not customer-service oriented, that the agencies are more concerned with the process and the paper than on the actual results attained, and that they often make decisions out of the public eye and without sufficient public input. The Group believes that we need to change the culture in which State agencies function and how State employees treat the citizens they serve.

In too many instances, individuals and businesses that apply for a permit, especially from regulatory agencies such as the Department of Environmental Protection, are treated as if they are trying to do something wrong rather than trying to do something that the law allows. A permitted activity is essentially that, an activity that the law permits to occur, not something that should be discouraged or automatically rejected. Permit applicants represent interests that are seeking to enjoy the benefits that life in the State offers or are trying to achieve economic gain, both of which should be encouraged within the confines of the law.

The Group recommends that Cabinet Officers instill in their departments a conviction that New Jersey must become a “yes we can” place to do business and State employees must become customer-service oriented. To do this a “change management” process must be put into place following standard organizational development theories, practices and processes. The strategy must be clearly defined, the workforce properly prepared and the process managed at all levels.

State agencies must also measure success in a totally different manner. Success is not based on the number of permit applications processed, fines imposed, or pages of regulations adopted. It is measured by our ability to improve the quality of life for the citizens of New Jersey and by meeting the overall policy goals which support that quality of life.

The Group recommends that an Executive Order be issued to ensure that Cabinet Officers develop a set of metrics for each of their Departments that establish quantifiable results-oriented goals and that reports be issued each year to show progress toward those goals.

The Group recommends that Cabinet Officers require their Departments to be as open as possible in their decision-making processes and that, when major decisions are being considered,

extensive outreach, including stakeholder and workgroups, be established to gain as much information as possible. This is also consistent with many of the “Common Sense Principles” enumerated in Executive Order No. 2.

**B. “The Red Tape Review Group endorses the creation of a new model for job creation and retention, economic growth and investment in this State, and the consolidation of existing economic development programs to a central source under the supervision of the Lieutenant Governor.**

Regulation in New Jersey has made the cost of doing business in the State higher than in other states in many ways. The inefficiencies and excessive cost of regulation have impeded the overall development of the economy and the growth and expansion of the State’s individual businesses, and has discouraged the location of new business in New Jersey. Neighboring states, on the other hand, have been successful in retaining and attracting new private-sector investment and jobs.

The current economic climate in our State simply is not tolerable and requires a new course, one where all hands are “on deck” working together to jump-start the economy and create optimum conditions for future growth and prosperity. The work of the Red Tape Review Commission clearly signals the State’s recognition that it must change how it does business if it is to bring New Jersey aggressively back into the marketplace for jobs and investment, both domestically and worldwide. Critical to the long-term success of the overall effort will be the involvement of New Jersey’s business community. To this end, the Group is supportive of a new model for the State’s economic development, investment and job creation programs. Key participants in this new approach will be the Lieutenant Governor, existing programs within State Government and New Jersey’s business leaders.

State Government must take the lead in transforming New Jersey’s business climate into one that is supportive and open to business. There currently is a need in New Jersey for a proactive, integrated business retention and expansion strategy focused on providing professional, coordinated services to both new and existing businesses. There also is a dire need for a single point of operations to exclusively coordinate an efficient and timely process for submission, evaluation and resolution of applications for business permits, licenses, certificates and other approvals. The most potent way to send a signal, both within and outside the State Government, that things are going to be different is to place the primary responsibility for assisting businesses to deal efficiently and effectively with State regulations with the Lieutenant Governor. Under this new model, the Lieutenant Governor would be responsible for “breaking down silos” -- resolving internal differences and compelling departments and agencies to work together on an integrated and outcomes-based approach.

To further facilitate a “one-stop-shopping” experience for businesses, the Lieutenant Governor would maintain and oversee staff to provide guidance to persons who inquire about



permits, licenses, certificates and other business-related approvals. As the State's driver of economic growth, the Lieutenant Governor would work with the various State departments, agencies and divisions to facilitate and expedite permitting processes. To support the Lieutenant Governor in carrying out these new responsibilities, we recommend that each State department designate a liaison at the deputy or assistant commissioner level to work directly with the Lieutenant Governor and her staff, similar to the recommendation of the Subcommittee on Economic Development & Job Growth. Also, it should be made clear, both internally and externally, as to whom within State Government is responsible for these functions and oversight. These functions are best led by the Lieutenant Governor.

The most successful states have created specially empowered not-for-profit organizations to plan and execute business development and corporate outreach strategies, typically relying on a mix of public funding and corporate financial support. The Commission also endorses this approach and supports the creation of such an entity to participate with State Government in the new model. Given New Jersey's current budgetary constraints, it simply cannot afford to effectively market its vast assets to attract and retain businesses. However, neither can the State afford to continue to lose business and jobs to neighboring and other states. New Jersey would be well served by an organization whose primary mission is to aggressively market and promote the State as a place in which to invest and do business, highlighting the State's core strengths, including its strategic access to local and global finance markets, highly trained workforce, creative project funding, world class seaports and airport, extensive energy and communications infrastructure and elite research universities.

This not-for-profit organization would be privately managed and led. Its governing board would be comprised of a small, diverse cross-section of chief executive officers from some of the State's leading industries. In order to be most effective, this newly formed organization should be funded with private funds. The organization would be managed by a chief executive officer and skilled professional staff recruited from within industry and the ranks of professional economic development organizations nationally. This organization would develop targeted "contact" strategies focused on the industries and projects the State most wants and can realistically attract; participate in industry conferences and trade shows; and, conduct targeted advertising to reach potential "customers." Key to the development of this outreach would be an ongoing dialogue with input from the State.

The EDA is a well established authority, which has among the broadest range of powers of any public and/or private economic development entity, serving as an economic development, real estate development and incentives manager. Given the fact that it is the central point of contact for the majority of the State's incentive programs, EDA could serve as the financial arm of this new approach. In keeping with EDA's mission to attract and retain businesses through financial assistance, once prospects are identified, the EDA would continue to provide the required financial solutions, as well as analysis of the competitive gap to be addressed on a project-by-project basis. This could include tax-exempt and taxable bond financing, loans, loan

guarantees, venture capital and business and tax incentives, along with other incentives and variables as may be necessary in order to close the competitive gap.

Both government and the private sector are deeply committed to the economic welfare of New Jersey and together can change the trajectory of the State's economy. This new economic development model, the Lieutenant Governor, EDA and the planned not-for-profit organization - each would have clearly defined, yet highly complementary, role that could provide the State with a comprehensive and competitive approach to retaining and attracting businesses. The Group is confident that such a partnership would deliver the highest level of industry-leading marketing and "total customer experience" that New Jersey needs to win and retain more jobs and investment.

**C. The Red Tape Review Group endorses improvements to the State Government's approach to information technology which recognize that "Technology is the Enemy of Bureaucracy."**

The Group heard testimony throughout its deliberations that New Jerseyans regard their government as being a vast bureaucracy with too many insular agencies, many drifting away from a focus on the needs of citizens and businesses toward the needs of Trenton. The Group believes that there is no better place to confront this challenge than in the relationship between State Government and the business community. Facing a severe economic climate and historic fiscal challenges, the government must work to make New Jersey competitive again.

The Group recognizes that the effort made and the outcome realized in attracting, retaining, and supporting businesses will go a long way toward defining New Jersey's future. Information Technology (IT) can play a key role in this transformation. This is a key resource at our disposal to rapidly and cost-effectively change the way government operates while reorienting the relationship between the State Government and the business community.

The current structure of State Government has grown over time, often as a result of decisions that were based on specific needs or in an effort to react to specific problems. While much attention is correctly focused on improving the delivery of services to constituents by eliminating organizational inefficiencies, the Group believes it is not necessary to wait for departmental reorganization to occur in order to deliver on the goal of improved and integrated services to the business community.

Over the years, private sector companies have worked hard to offer on-line services through a consolidated view of their customers. Regardless of the number of computer systems residing in the back office, they've taken the steps to link them in order to provide seamless service to their customers. State Government should work just as hard in this regard.

The Office of Information Technology (OIT) has proposed a series of ideas to improve the State's approach to IT issues using existing fiscal resources. The central elements of this plan respond to issues raised by persons appearing before the Group, and are outlined below:

*What Taxpayers and Persons Creating Jobs and Investment Should Expect*

- **Convenient and Efficient Access to Integrated Services providing businesses with easy access to efficient and integrated services, and simple methods to fulfill reporting obligations, saves businesses time and money, and promotes a more efficient state government.**

Access to integrated services, and methods to fulfill reporting obligations, will be provided through online channels that businesses find convenient. They will be organized by function and not by agency to insulate businesses from organizational boundaries within State Government. A single online "Customer Account" will be developed for each business operating in or moving to New Jersey. The account will be used by authorized representatives of a business to conduct online transactions, fulfill reporting requirements, seek automated and online help, interact with call centers, and apply for services and financial subsidies, across all agency boundaries. Through the "Customer Account," authorized representatives will have a comprehensive view of a business's interactions and its relationship with State Government. Agencies will accept a single set of credentials from businesses and where permissible, use the same information provided by them, so as to minimize the business's need to provide the same information over and over again.

Today, a business paying taxes, applying for a Department of Environmental Protection permit, and competing for a State contract, must maintain multiple accounts with the State Government. This requires the business to register multiple times and to manage multiple versions of the same information across the bureaucracy. Businesses fiercely compete to survive and prosper in the marketplace, and every dollar spent navigating the bureaucracy is a dollar no longer available for capital investment or new hires. The State must rapidly move to provide more convenient access to integrated services for the business community.

New Jersey should enhance and expand its Premier Business Services (PBS), currently managed by the Divisions of Revenue and Taxation. PBS currently allows one-stop access to all electronic tax filing and payment services applicable to a business, as well as access to the business's filing/payment history. While presently lacking a cross-agency perspective, and in need of a more user-friendly interface, its online process for vetting a business's credentials is notable. PBS should be enhanced to be even more user-friendly and expanded, cross-agency, to become the single "Customer Account" for each business.

- **World Class Customer Service Employees and Processes Businesses interacting with knowledgeable State Government employees, who have a comprehensive view of a business's interactions with State Government, saves time and money and provides the State Government with opportunities for improving and enhancing service delivery.**

To efficiently coordinate and provide services to businesses, State Government employees and agents who serve the business community will have available, appropriate views of "Customer Account" information that span organizational boundaries. Protocols and workflows that coordinate, improve responsiveness, and enhance and speed the delivery of integrated services will be automated, and used across agencies.

Today, there is no easy way to identify the services a business is receiving from various State agencies. This hinders New Jersey's ability to coordinate service delivery and to proactively promote new opportunities. Each agency maintains its own set of business information and typically lacks the protocols and technologies for inter-agency sharing of that information.

For example, development subsidies, environmental permits, training grants, and highway right-of-ways are provided by different agencies. A New Jersey business, seeking to expand, is left on its own to determine which of these services are available or required for its expansion. It is then left on its own to coordinate the delivery of these services. Without a coordinated response, this process may be prolonged unnecessarily costing the business time and money.

From a policy perspective, in order to make informed decisions, the State needs reliable analytics to gauge the impact of programs on specific businesses or business groups. Today, each request for a composite, cross-agency view of the services provided to a business becomes an onerous task likely to involve multiple staff resources from multiple agencies. Unfortunately, businesses are often more knowledgeable about the services they are receiving from the State than is the State Government itself.

New Jersey should expand and enhance its Customer Relationship Management (CRM) system, championed by the New Jersey Economic Development Authority (EDA), and used primarily to manage a business's interactions with the EDA. The CRM system should be used to organize and synchronize business processes across agency boundaries. While presently lacking a cross-agency perspective, and in need of a unique business identifier to link disparate agency systems, the CRM system could be used to rapidly improve the coordination of services.

- **Transparency -- An open government that provides businesses with a clear view of its activities encourages honesty, integrity, and efficiency.**

All public information, including financial, regulatory, and operational information should be readily available to any business. It should be provided online, organized to be easily accessible and searchable, and consistently branded. While the State has developed a one-stop business portal, the inability to link together agency systems in order to provide a composite view of activities across State agency silos inhibits the desire for transparency.

- **Opportunities for Active Participation -- An ongoing, two-way conversation between businesses and State Government encourages government responsiveness and innovation.**

State Government should increase its presence and participation in business-oriented social networking sites, and will use automated help and survey forums, to better understand the needs, questions, and ideas of businesses.

Today, New Jersey provides few opportunities for small businesses to be heard. The State relies heavily on standard call centers to resolve problems, collects ideas and issues from businesses through the submission of forms, and uses simple ‘frequently asked questions’ as automated help. Modern day companies use more sophisticated methods to gather customer feedback and provide world-class customer service.

In March 2010, Facebook surpassed Google as the most visited site in the United States. Facebook is increasingly being used as a home for small business websites and business networking. Most State agencies block access to Facebook. Starbucks uses Salesforce.com’s “IdeaExchange” to accomplish online polling and voting for product development -- always maintaining a critical touch point with its customers. No State agencies currently maintain this sort of relationship with the State’s customers. Dell Computer uses online chat to allow its technicians to maintain multiple help sessions with customers seeking assistance. None of the major State agencies serving the business community have implemented similar technology. While progress has been made within a few agencies, a statewide approach needs to be developed that takes advantage of the power of social networking media.

#### *How Should the State IT System Operate?*

- **Use Technology to Present a Unified View of New Jersey State Government**

Government will always consist of organizational silos that treat the management of information as discreet agency responsibilities. Unfortunately, government’s inherent organizational boundaries are counterintuitive to businesses. In order to provide businesses with

a clear and easily navigable view of its activities, government can use current technologies to create a transparency (i.e., information) layer above the organizational silos.

The State should commit to building an architectural blueprint that guides the structure of the transparency layer and that blueprint should be a required design element in every IT project. All business-related IT projects will be required to integrate with the transparency layer.

- **Drive Efficiencies into Government Operations**

Interagency protocols, workflows, and IT activities will be vetted against a blueprint of the administration's business goals. Proposed protocols, processes and IT activities that are not aligned with a clearly articulated business driver, will not be undertaken.

- **Embrace New IT Delivery Models**

Historically, government IT practitioners relied heavily upon the construction and management of physical infrastructure (e.g., networks, servers, software) to deliver services. However, today's IT industry is transforming into a virtual, Internet-based service delivery engine. IT companies now provide an array of models from simple data center hosting to fully operational software as a service (SaaS). IT management should fully assess alternatives for delivering electronic services. The old paradigm in which government must build everything will shift to a model where the most appropriate delivery model is used.

**D. The Red Tape Review Group recognizes that the Office of Smart Growth and the State Planning Commission need to be strengthened. A transfer of their functions to the Department of State could serve to reinvigorate the planning functions of State Government, and ensure that planning activities complement job creation and retention, economic growth and investment.**

The Office of Smart Growth (OSG) in the Department of Community Affairs (DCA) provides staffing to the New Jersey State Planning Commission (SPC) and the New Jersey Brownfields Redevelopment Task Force. Through the State Development and Redevelopment Plan, the OSG works to improve the efficiency and reduce the costs of land development and infrastructure in New Jersey by expanding areas of coordination and cooperation among State and local agencies.

The OSG was initially constituted as the Office of State Planning in 1986 to staff the SPC in developing and implementing the State Development and Redevelopment Plan and to pursue other activities to improve intergovernmental coordination and cooperation as defined by the

“State Planning Act.”<sup>29</sup> As originally envisioned, the OSG and SPC would streamline the planning and development process in the State and serve as the focal point at which various State agencies would coordinate to advance State planning strategies. These planning strategies would then engender economic growth opportunities in a streamlined and predictable manner.

Members of the planning community as well as members of the Governor’s Transition Subcommittee for the Department of Community Affairs, note that the OSG and SPC have not achieved their intended purposes for several reasons. First, the planning functions and controls over vast areas of land in the state are governed by other planning entities and regulatory schemes (Highlands, Pinelands, Meadowlands, Fort Monmouth, CAFRA, etc.). Second, cooperation with the OSG is voluntary and there is no reason or incentive for municipalities to work within its guidelines or planning strategies. Third, OSG and SPC have no enforcement powers. Fourth, in light of the foregoing, OSG has become a mere advisory office. Fifth, OSG and SPC’s interaction with other State agencies that have enforcement powers, most notably the DEP, further frustrates their purposes, since the functions of OSG and SPC are almost always duplicated by other State agencies.

Accordingly, the planners and the DCA Transition Subcommittee recommended one of two options: the OSG and SPC be abolished; or both entities be repositioned in the Department of State as a “one-stop” shop wherein the private and public sectors can utilize them for purposes of carrying out future development of the State. The focus of such an office would be to serve as a liaison with all State agencies involved in the oversight or regulation of development projects Statewide.

Testimony before the Red Tape Review Group did not support the abolition of either the OSG or the SPC. In fact, there was considerable support for the idea that a new State Plan for the 21<sup>st</sup> century must be developed that sets up key principles, and State agency rules and master plans must be coordinated with this overall State Plan. Witnesses proposed that state planning should be used as a tool to align all levels of government behind a shared vision for future growth and preservation, as well as a means to streamline and coordinate regulations and focus capital spending.

Additionally, witnesses noted that there exists a multitude of plans established by numerous State agencies that may or may not be coordinated with the State Development and Redevelopment Plan. These plans include documents such as the DEP Statewide Water Supply Plan, the DOT and New Jersey Transit 2030 New Jersey Long Range Transportation Plan, the DOT 2007 Comprehensive Statewide Freight Plan, the Pinelands Comprehensive Management Plan, the Highlands Regional Master Plan, the Coastal Zone Management rules, the New Jersey

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<sup>29</sup> N.J.S.A. 52:18A-196 et seq.

Meadowlands Commission Master Plan, the Global Warming Response Act Recommendations Report, and the New Jersey Energy Master Plan, to name but a few.

The Red Tape Review Group concurs with the sentiments expressed by witnesses that New Jersey's planning and regulatory environment sends conflicting signals about where growth will be supported by State permits and policy. While these conflicts are not necessarily a result of bad or unnecessary regulations, they are the result of the fact that State regulations are not coordinated with each other, and are devised by individual agencies acting in an autonomous manner.

**E. The Red Tape Review Group created pursuant to Executive Order No. 3 (2010) recommends the creation of an ongoing Red Tape Review Group.**

The members of the Red Tape Review Group believe that the establishment of an ongoing, transparent and bi-partisan entity to continue the work started by the Group established pursuant to Executive Order No. 3 (2010) is warranted. Such a recommendation is in keeping with the commitment made by the Governor in the 2009 general election campaign to make red tape review a "permanent feature" of his administration.

First, the sheer number and volume of submissions presented to the 90-day Group constitutes a strong argument in favor of the establishment of a permanent body that can be convened after consultation with the bi-partisan leadership of the Legislature. Individuals can appear before this body on a periodic basis to bring complaints about, or suggestions to improve, the regulatory process. Second, a long-term approach to regulatory reform is in keeping with activities in other states. For example, the Virginia Government and Regulatory Reform Task Force took three years to accomplish its review of 8,700 pages of regulations in that state.<sup>30</sup> In Massachusetts, a joint effort to review regulations by the Governor and Attorney General began in October of 2007 and remains ongoing as of the date of this report.

The creation of an ongoing review body could help ensure that State agencies complete their review of existing rules and regulations required under the provisions of Executive Order No 2 (2010). Finally, a permanent group could serve a useful role in advising the Lieutenant Governor on an ongoing basis with respect to administrative rules and regulations that unnecessarily impede job creation, economic growth and investment in this State.

The Red Tape Review Group believes that in order for such a group to enjoy the confidence of the general public, it should contain members from as broad a cross-section of New Jersey as possible, including former State and local officials, leaders from large and small business, environmentalists, consumer advocates, in addition to private citizens. The Group believes that specific criteria should be established to ensure that the deliberations of such a

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<sup>30</sup> [http://www.vaag.com/PRESS\\_RELEASES/AttorneyGeneral\\_web.pdf](http://www.vaag.com/PRESS_RELEASES/AttorneyGeneral_web.pdf)



group are open and fair to all parties, and that input is solicited from individuals who support, as well as oppose regulations under review. The ongoing Group should consider establishing subcommittees that correlate to policy areas and/or State agencies.

The Group believes that legislation currently pending in the 2010-2011 legislative session contains a number of elements that could guide deliberations on the creation of a body to review regulatory policy in this State. Senate Bill No. 339 (Oroho/Sweeney) establishes the “New Jersey Commission on Government Efficiency and Cost Control” to recommend measures for efficiency and cost reduction in State Government operations. Although S-339 creates a commission to deal with government efficiency generally, its provisions contain proposals that would prove useful in the creation of a body to review rules and regulations. For example, S-339 contains suggests that the State Government solicit input, ideas, and recommendations from current and retired State Government workers through a website and through the county-based 211 telephone system. The legislation also provides for the appointment of active or retired employees of private-sector companies who, through their performance in the private sector, have demonstrated an exceptional ability to conduct business operations in an efficient and cost-effective manner.

Accordingly, the Governor should replace Executive Order No. 3 (2010) with a new ongoing Red Tape Review Group.

**F. The Red Tape Review Group recommends the elimination of Executive Orders that confuse or impede economic growth activities should be rescinded.**

The Red Tape Review Group recommends that Executive Orders that confuse or impede New Jersey’s economic growth strategies be rescinded. A list of these potential Executive Orders for elimination are included in the Appendix I to this report.

## IX. BACKGROUND INFORMATION

### A. HISTORY OF PREVIOUS REGULATORY REFORM EFFORTS IN NEW JERSEY

Bringing “common sense” into the regulatory process has been attempted by prior administrations with varying degrees of success. While each of the previous endeavors sought to unshackle the State’s economic growth potential from unreasonable and unproductive regulations, the current unprecedented economic crisis in New Jersey elevated the profile and the importance of this reform effort. Governor Christie also recognized that a successful attempt at statewide reform to rekindle job creation would required no less than the expertise, energy and coordinated efforts of the bi-partisan Red Tape Review Group and a commitment to make such an effort an ongoing part of his administration.

#### *Reform by Executive Order*

While perhaps not as immediate in breadth or scope, executive orders have been issued by prior governors with a similarity of spirit. For example, stating that “[t]he number of boards, commissions, committees and councils are proliferating needlessly,” Governor Byrne signed Executive Order No. 54 in 1977 to order an annual review by each department to justify the existence of it boards, commissions, committees and councils, to be approved by the Office of the Governor’s Counsel. As evidence that permitting problems are not a modern day phenomenon, that same year Governor Byrne established the Cabinet Committee on Permit Coordination (the “Committee”) by Executive Order No. 57. The Committee included the Commissioners of Community Affairs, Environmental Protection, Transportation and the Office of Business Advocacy, among others, to analyze the permitting process and make suggestions for improvement. Any person who proposed a construction project with costs of \$500,000 or more was given access to the Committee to discuss the project and assigned a state employee as “expediter” to coordinate the review of the project, advise the applicant and keep the Committee abreast of developments. Governor Byrne also created the Citizen Committee on Permit Coordination to advise the Committee. Moreover, the executive order directed that all departments “shall approve, condition or disapprove an application for a construction permit within 90 days following the date that application is complete.”

Through Executive Order No. 100 in 1985, Governor Kean resurrected the Committee with additional Commissioner members, the Citizens' Committee on Permit Coordination and ordered that a Permit Coordinator from the Office of Business Advocacy expedite permit reviews for all projects. The executive order also urged the construction industry to utilize the newly-developed "One Stop" Permit Identification System.

In April 1994, by Executive Order No. 15, Governor Whitman subsumed the Committee and the Office of Business Advocacy into the newly created Office of Business Ombudsman within the Department of State. (By Executive Order No. 1 in 1994, Governor Whitman created the New Jersey Economic Master Plan Commission that was charged with developing a plan for economic growth and sustainable prosperity. The Commission identified permitting and undue regulatory enforcement as hindrances to economic growth.) The Office of Business Ombudsman was to direct "a comprehensive effort to assist businesses in dealing effectively with State Regulations." In 1977, Executive Order No. 71 moved the Office of the Ombudsman to the Department of Commerce and Economic Development where an Account Management System was established to formulate and execute strategies to attract and retain businesses in New Jersey. Alongside marketing efforts, endeavors to reform the system increasingly became focused on how best to negotiate the regulatory maze.

In April 2006, Governor Corzine signed Executive Order No. 6, creating the New Jersey Commission on Government Efficiency and Reform ("GEAR"). The purpose of GEAR was to "evaluate the budget, structure and organization of government in New Jersey...and advise the Governor on governmental restructuring, effectiveness, best practices, efficiencies, cost-saving measures, and how best to achieve economies of scale in the delivery of services and programs, at the lowest possible cost, consistent with mission and quality." GEAR developed task forces to help execute its mission: the Higher Education Task Force, the Budget Controls and Personnel Reform Task Force, the Task Force on Sentencing and Corrections, and the Health Care Task Force. Subsequent reports by these Task Forces offered an array of recommended changes on a host of State activities, not all of which were implemented.

### *Past Reports with Recommendations*

One of the more comprehensive treatments of regulatory reform in recent history was a product of the 1988 Study Commission on Regulatory Efficiency ("SCORE"), created through legislative enactment in 1987. In fact, the true genesis of SCORE was an initiative begun in 1985 through the Coalition for Regulatory Efficiency, developed in part "to serve as a vehicle to create heightened public awareness of the developing [regulatory] crisis." SCORE sought to identify rules and regulations that were duplicative, unnecessary and that unfairly increased the cost of doing business in New Jersey. In its 25-page report, the SCORE team advanced 24 recommendations covering four categories: (1) legislative, (2) agency, (3) Administrative

Procedures Act, and (4) implementation. As recently as December 2009, not all of the SCORE recommendations had been implemented, and the status of other recommendations was inconclusive.

Whitman efforts resulted in the larger initiative, Strategy to Advance Regulatory Reform (STARR). In July 1995, the STARR report was issued; it was followed by a detailed “A Progress Report on Regulatory Reform” a year later. It was developed “to harness the energies of business and government to provide the highest quality of life.” Based on information collected in hearings held in the fall of 1994, the report sought to identify specific priorities for action; present guiding principles for each agency to follow; detail the initiatives, priorities and accomplishments of the various Cabinet Departments; and benchmark those needs with recommendations from past reports.

In March of 1994, a report developed by the New Jersey Institute of Technology (NJIT) for the Senate Budget and Appropriations Committee also focused on regulatory reform. That NJIT report (“A Review of the Economic Impact of Environmental Statutes, Rules and Regulations on New Jersey Industry”) identified categories of critical issues impacting the State’s business climate such as: 1. excessive fees and fines; 2. overly adversarial relationships between regulators and businesses; 3. high compliance costs; 4. burdensome paperwork; 5. state-of-the-art technology requirements; 6. obstacles to research and development activities; 7. right-to-Know labeling and reporting requirements; and 8. compliance assistance for small business manufacturers. It made 24 recommendations for legislative and regulatory changes. Not all of these recommendations were implemented.

While many good ideas for government reform were never executed, the current economy almost demands action. Under the leadership of Lieutenant Governor Guadagno and with consensus agreement by the Executive and Legislative members on the recommendations to eliminate unnecessary red tape and foster job creation, there is reason to be optimistic that the Red Tape Review Group will be able to succeed where past efforts have fallen short.

## B. THE ADMINISTRATIVE RULE-MAKING PROCESS IN NEW JERSEY: AN OVERVIEW

The “Administrative Procedure Act,” (APA)<sup>31</sup> establishes the procedures that executive branch agencies must follow when exercising their authority to adopt rules and regulations.

### OFFICE OF ADMINISTRATIVE LAW

The New Jersey Office of Administrative Law (OAL) is an Executive Branch agency located in, but not of, the Department of Treasury. The OAL advises Executive Branch agencies on making rules and regulations, and requires the agencies to follow statutorily prescribed steps in rulemaking. Further, it ensures that the promulgation of rules and regulations includes adequate opportunity for input by anyone interested and affected. The Division of Administrative Rules in the OAL reviews all Executive Branch agency rulemaking notices for compliance with the APA and the *Rules for Agency Rulemaking*.<sup>32</sup> The division also serves as a resource for State agencies for the proper adoption of rules and regulations.

Executive Branch agency rulemaking notices are processed by the OAL for publication in the *New Jersey Register* (the “Register”), which is published twice a month. The Register is the official publication for duly proposed and adopted rules and regulations. The Register also contains Executive Branch agency public notices, Executive Orders and Reorganization Plans. Following publication of adopted rules and regulations in the Register, rules and regulations are incorporated into the New Jersey Administrative Code (N.J.A.C.), which is the official OAL publication containing all effective rules and regulations adopted by executive branch agencies. Each agency’s body of rules and regulations is codified in a title of the NJAC.

The OAL Division of Rules, through its Manager and staff, oversees publication of the *New Jersey Register* and the New Jersey Administrative Code by LexisNexis Matthew Bender. The current publishing contract runs from February 2005 through February 2012. Under the terms of the contract, the OAL receives an annual licensing fee in the amount of the staff salaries of the Division of Administrative rules, plus royalties of 21% of gross sales, together totaling almost \$1 million per year.

### *ADMINISTRATIVE LAW JUDGES*

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<sup>31</sup> N.J.S.A. 52:14B-1 et seq.

<sup>32</sup> N.J.A.C. 1:30 et seq.

As stated above, the OAL is independent of supervision or control by the Department of Treasury. The OAL is headed by a Director who reports directly to the Governor and who serves as the chief judge to a group of administrative law judges. An administrative law judge (ALJ) is a full time officer of the OAL, and is not permitted to hold other employment. An ALJ is appointed by the Governor and confirmed by the Senate for a one-year term. After this initial term, the Governor may re-appoint the ALJ to a four-year term. Any subsequent reappointment is to a five-year term and requires Senate confirmation.

The ALJs are responsible for the administrative hearing functions of all but certain specifically exempted types of cases,<sup>33</sup> and cases where a State agency head decides to conduct a hearing rather than transmit the matter to the OAL.<sup>34</sup> Upon determining a matter to be a “contested case,” a State agency transmits the contested case to the OAL. Litigants do not apply directly to the OAL for a hearing. As a general rule, hearings are public, except special education and certain human services cases, where confidentiality is required by federal regulations. An ALJ presides over a contested case, which is conducted according to hearing rules established by statute and by the OAL. The ALJ provides a neutral forum where the evidence of all parties, often including the agency with subject matter jurisdiction over the case, is presented.

The ALJ prepares an initial decision that is sent to the State agency head within the time frame set by statute for the particular substantive area of the case, usually 45 days. The ALJ’s initial decision may be affirmed, modified, or rejected by the agency head empowered to make a final decision in the matter. Any order or final decision rejecting or modifying the initial decision must specify in clear and sufficient detail the nature of the rejection or modification, the reasons for it, and the changes in result or disposition caused by the rejection or modification. If a State agency head does not adopt, reject, or modify the initial decision within 45 days, and unless the period is extended as provided by statute, the initial decision becomes the final decision.

#### THE “ADMINISTRATIVE PROCEDURE ACT”

The APA defines an “administrative rule” as an agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and interagency statements; and (3) agency decisions and findings in contested cases. The OAL *Rules for Agency Rulemaking* provide that, for

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<sup>33</sup> Exempted cases include those arising from the Parole Board, the Public Employment Relations Commission, the Division of Workers' Compensation and the Division of Tax Appeals.

<sup>34</sup> N.J.S.A. 52:14F-8.

purposes of determining effective dates, there are five types of rules and regulations: new rules, amendments, repeals, re-adoptions, and emergency rules.<sup>35</sup>

The APA requires an agency to give notice of its intention to adopt, amend or repeal a rule or regulation, and to publish that notice in the *New Jersey Register*. The notice must include a summary of the proposed rule or regulation and various analyses of its potential impact. The agency must give members of the public reasonable opportunity to comment on the proposal, and must publish a report of those comments, along with the agency's response

### *PRE-PROPOSALS*

The OAL has adopted rules and regulations for the use of "pre-proposals" by Executive Branch agencies. A "pre-proposal" refers to a preliminary proceeding for the purpose of eliciting ideas, views and comments of interested persons on a contemplated rulemaking proceeding. It may include a notice of the subject matter of the intended rulemaking without proposing the text of a rule or regulation and request the public's viewpoint on the particular area sought to be regulated and the particular provisions which should be included in the proposed rule, or if specific rule changes are contemplated, an agency may publish a pre-proposal notice with the proposed text of a rule and elicit the public's comments.

This preliminary proceeding precedes the filing of a formal rule proposal, and is not required by the APA. An agency may use any reasonable informal procedures and means of notice to solicit participation from the regulated or interested public. However, the *Rules for Agency Rulemaking* provide that when a State agency determines to conduct a deliberative proceeding with respect to a contemplated rulemaking, the agency shall submit a "notice of pre-proposal" to the OAL for publication in the Register and provide at least a 30-day public comment period prior to submission of any formal notice of proposal on the same subject.

### *RULE PROPOSALS*

The APA provides that prior to the adoption, amendment or repeal of any rule or regulation, an agency must provide notice of the "terms of substance" of its intended action. The APA requires an agency to prepare for publication in the Register a statement setting forth a summary of the proposed rule or regulation, an explanation of the purpose and effect of the rule or regulation, the specific legal authority under which its adoption is authorized, a description of the expected socio-economic impact of the rule or regulation, a regulatory flexibility analysis, or the statement of finding that a regulatory flexibility analysis is not required, a jobs impact statement, and an agriculture industry impact statement. A rule proposal is also required to include a federal standards statement and a smart growth impact statement; and according to the

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<sup>35</sup> See N.J.A.C. 1:30-1.2

*Rules for Agency Rulemaking*, the “socio-economic statement” is divided into a social impact statement and an economic impact statement. A rule proposal is also required to contain a housing affordability impact statement and a smart growth development impact statement.<sup>36</sup>

### *IMPACT STATEMENTS*

The social impact statement describes the expected social impact of the proposed rulemaking on the public. It includes a description of who is affected, the nature of the social impact, the projected reaction to the rule or regulation, an explanation of the positive or negative consequences to the various parties affected, and any social conditions which may have precipitated the rule or regulation.

The economic impact statement includes an explanation of who the proposal will affect economically and describes the expected costs, revenues, and other economic impact upon governmental bodies of the State and any segments of the public proposed to be regulated. State agencies which adopt, re-adopt or amend State regulations that exceed any federal standards or requirements are required to include in the rulemaking document a “Federal Standards Analysis.” The analysis is to include “a statement as to whether the rule or regulation in question contains any standards or requirements which exceed the standards or requirements imposed by federal law.” This requirement applies to any rule or regulation that is adopted, re-adopted or amended under the authority of or in order to implement, comply with or participate in any program established under federal law or under a State statute that incorporates or refers to federal law, federal standards or federal requirements.<sup>37</sup>

The jobs impact statement is required to include an assessment of the number of jobs to be generated or lost if the proposed rule takes effect. In addition, an agriculture industry impact statement provides information on the impact of the proposed rule or regulation on the agricultural industry, and requires the State Agriculture Development Committee to review the rule proposal to determine its impact on the agriculture industry of the State. If the committee determines that the proposed rule or regulation adversely impacts the agricultural industry in a significant manner and notifies the State agency of that determination, the agency must consult with the SADC prior to the adoption of the regulation.<sup>38</sup>

Under the provisions of the “New Jersey Regulatory Flexibility Act,” a regulatory flexibility analysis is required if a rule imposes any reporting, recordkeeping or compliance requirements on small businesses.<sup>39</sup> The law defines a “small business” as any business which is

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<sup>36</sup> N.J.S.A. 52:14B-4.1b

<sup>37</sup> Exec. Order No. 27 (Whitman) (1994), (<http://www.state.nj.us/infobank/circular/eow27.htm>) & N.J.S.A. 52:14B-22.

<sup>38</sup> N.J.S.A. 4:1C-10.3

<sup>39</sup> N.J.S.A. 52:14B-16 et seq.



resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees. A rule proposal must include either a regulatory flexibility analysis or a statement of finding that a regulatory flexibility analysis is not required.

State law also requires the filing of a housing affordability impact statement, which requires State agencies to provide: an estimate of the number of housing units impacted by the proposed rule; and (2) an estimate on the increase or decrease in the average cost of housing which will be affected by the rule. The housing affordability impact statement is not required if the State agency determines that the rule would impose an insignificant impact on housing, either because the scope of the rule is minimal or it is unlikely that the regulation would result in a change in housing costs.<sup>40</sup>

Current law further requires the filing of a smart growth development impact statement, which describes the types and an estimate of the number of housing units which a proposed rule would apply to, an estimate of the increase or decrease in the availability of affordable housing which will be affected by the regulation, and a description of whether the proposed rule would affect new construction within Planning Area 1 or 2, or within designated centers under the State Development and Redevelopment Plan. Like the housing affordability impact statement, this statement is not required if a State agency determines that the proposed rule would have an insignificant impact, or if there is an extreme unlikelihood that the rule would change housing production within Planning Area 1 or 2 or within designated centers.

Finally, an Executive Order issued in 2002 requires State agencies which adopt, amend or repeal any rule or regulation adopted pursuant to the APA to include a “smart growth impact statement” describing the impact of a proposed rule or regulation on the New Jersey State Development and Redevelopment Plan.<sup>41</sup>

#### QUARTERLY RULEMAKING CALENDARS

The APA requires agencies to develop and publish in the *New Jersey Register* a quarterly rulemaking calendar setting forth the agency's anticipated rulemaking activities for the upcoming six months. Each item listed on the calendar is required to include a citation to the legal authority authorizing the rulemaking action, a synopsis of the rulemaking and its objective or purpose, and the month and year in which publication of the notice of proposal is anticipated. The APA also states that a State agency notify OAL when it wishes to amend its calendar of rulemaking activities. Further, the APA requires that any change in rulemaking calendar shall provide that the agency take no action on that matter until at least 45 days following the first

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<sup>40</sup> N.J.S.A. 52:27D-329.1 et al.

<sup>41</sup> Exec. Order No. 4 (McGreevey) (2002) (<http://www.state.nj.us/infobank/circular/eom4.htm>)

publication of the amended calendar in which the announcement of that proposed rulemaking activity first appears.

The AP allows the following exceptions to the rulemaking calendar: (1) cases where failure to adopt the rule would prejudice the State under federal law; (2) cases where a specific statutory authorization requires the adoption of the rule in a shorter time period; (3) cases involving an imminent peril; (4) cases where the State agency has published a notice of pre-proposal for the rule; or (5) rules under which a 60-day comment period is provided.

### PUBLIC COMMENT PERIODS AND PUBLIC HEARINGS

The APA requires that all interested persons be afforded a reasonable opportunity to submit data, views, or arguments, orally or in writing, and that the executive branch agency consider all written and oral submissions respecting the proposed rule or regulation. If within 30 days of the publication of the proposed rule or regulation sufficient public interest is demonstrated in an extension of the time for submissions, the agency is required to provide an additional 30 day period for the receipt of submissions by interested parties and the agency may not adopt the proposed rule or regulation until after the end of that 30 day extension.

The APA requires an Executive Branch agency to conduct a public hearing on the proposed rule or regulation at the request of a committee of the Legislature, or a governmental agency or subdivision, or if sufficient public interest is shown, provided such request is made to the agency within 30 days following publication of the proposed rule in the Register. However, many agencies elect to conduct public hearings without such a request and publish notice of the public hearing as part of the proposal notice. The APA sets forth requirements for a public hearing, including the requirement for at least 15 days notice of the hearing, and that a verbatim record of each hearing must be maintained, and copies of the record be available to the public at no more than the actual cost. The hearing officer is also required to make recommendations to the agency regarding the adoption, amendment or repeal of a rule or regulation, i.e., the “Summary of Hearing Officer’s Recommendations and Agency Response” required to be included in the notice of adoption.

### RULE ADOPTIONS

When an agency adopts a proposed rule or regulation, the agency is required to prepare a “notice of adoption” and submit the notice to the OAL for publication in the New Jersey Register. The APA specifies a number of components that must be included in a notice of adoption, including, if appropriate: a “Summary of Hearing Officer’s Recommendations and Agency Responses”; a “Summary of Public Comments and Agency Responses”; a “Summary of

Changes Upon Adoption”; a “Summary of Agency Initiated Changes”; a Federal Standards Statement; and the text of any changes between the rules and regulations as proposed and as adopted, specifically indicating additions and deletions.

It should be noted that an agency may chose to partially adopt a proposal, i.e., adopt some pieces of a proposal and leave part of the proposal pending, or adopt some pieces of a proposal and re-propose other parts with changes. The time frame for an agency to go from publication of a proposal in the Register to adoption varies, depending on the length of the public comment period and the amount of public comment received; however, in no case can it take more than one year. If a proposal has not been adopted and filed with the OAL within one year from the date the notice of proposal was published in the Register, the proposal expires. Before the proposed rule amendment, repeal or re-adoption can be adopted; the agency must resubmit the notice of proposal for publication in the Register and must comply again with the notice and opportunity to be heard requirements of the APA.

#### DIFFERENCE BETWEEN PROPOSED & ADOPTED RULES

Where, following the notice of proposal, an executive branch agency determines to make changes in the proposed rule or regulation which are “so substantial that the changes effectively destroy the value of the original notice,” the agency is required to give a new notice of proposal and public opportunity to be heard. In determining whether the changes in the proposed rule or regulation are so substantial, OAL considers the extent that the changes: (1) enlarge or curtail who and what will be affected by the proposed rule or regulation; (2) change what is being prescribed, proscribed or otherwise mandated by the rule or regulation; or (3) enlarge or curtail the scope of the proposed rule or regulation and its burden on those affected by it. Where the changes between the rule or regulation as proposed and as adopted are not substantial, the changes do not prevent the adopted rule or regulation from being accepted for filing.

#### EXPIRATION DATES FOR ADOPTED RULES

Since 1978, all rules and regulations include an expiration date, or “sunset” date, of no later than five years from the effective date of the rule. This provision, which was implemented by Executive Order and later codified in the statutory law, was intended to discourage excessive agency rulemaking by requiring a reflective rulemaking review to eliminate unnecessary, redundant, confusing or unreasonable rules and regulations.<sup>42</sup> Each chapter of the administrative code has an expiration date of five years after the chapter’s effective date, unless a shorter expiration has been established for the rule or regulation. Expiration dates do not apply to rules that repeal other rules, rules and regulations that are mandated by federal law, and rules and

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<sup>42</sup> See Exec. Order No. 66 (1978) (Byrne) & N.J.S.A. 52:14B-5.1.

regulations where the expiration of the rules and regulations would violate any other federal or State law.

In order to maintain the effectiveness of a chapter of rules and regulations, the rules and regulations must be duly proposed for re-adoption, adopted and filed prior to the chapter expiration date. According to the OAL, approximately 35% of rule-making are re-adoptions. Upon the filing of a notice of proposed re-adoption, the expiration date of the subject chapter may be extended for 180 days, if such notice is filed with the OAL on or before the chapter expiration date. Re-adopted rules and regulations are effective upon filing with the OAL and any amendments to re-adopted rules and regulations are effective upon publication of the notice of adoption. Amendments enacted to the APA in 2001 also permit the Governor, upon the request of a State agency head, to continue in effect an expiring rule or regulation for a period to be specified by the Governor.

### EMERGENCY RULES

In the event that a State agency “finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days’ notice and states in writing its reasons for that finding, and the Governor concurs in writing that an imminent peril exists, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt the rule.”<sup>43</sup> Such a rule can only be effective for a period of not more than 60 days unless each House of the Legislature passes a resolution concurring in its extension for an additional 60 days. The rule cannot be effective for more than 120 days unless re-adopted in accordance with normal APA rule-making procedures.

To continue the provisions of an emergency rule beyond the statutory 60-day period of emergency, the agency may propose the provisions of the emergency rule in a notice of proposal which is filed with the OAL at the same time that the emergency adoption is filed. The notice of emergency adoption must state that the rule is being proposed concurrently. The concurrent proposal must comply with the APA procedures for rulemaking and may be adopted after the comment period. The adoption of the concurrent proposal is be effective upon timely filing (i.e., on or before the expiration date of the emergency rule.) of the notice of adoption with the OAL. Any changes to the re-adopted rule are effective upon publication of the notice of adoption. An adoption of a concurrent proposal filed after the expiration of the emergency rule is effective upon publication in the Register.

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<sup>43</sup> N.J.S.A. 52:14B-4(c) & N.J.A.C. 1:30-6.5

## THE SMART GROWTH OMBUDSMAN

Pursuant to legislation enacted in 2004, the office of Smart Growth Ombudsman was created in the Department of Community Affairs (DCA).<sup>44</sup> The Ombudsman is appointed by and serves at the pleasure of the Governor. Among the functions delegated to the ombudsman is the authority to review any new rules or regulations proposed by any State agency and determine whether the proposed rules or regulations, as they pertain to the smart growth areas, are consistent with the State Plan.

The term “smart growth area” is defined in the “State Planning Act” as Planning Area 1 (Metropolitan), Planning Area 2 (Suburban), a designated center, or a designated growth center in an endorsed plan; a smart growth area and planning area designated in a master plan adopted by the New Jersey Meadowlands Commission; a growth area designated in the comprehensive management plan prepared and adopted by the Pinelands Commission; an urban enterprise zone; an area determined to be in need of redevelopment under State law as approved by the DCA; or similar areas designated by the Department of Environmental Protection. The law also provides that in the event that the Smart Growth Ombudsman determines that the proposed rules or regulations in the smart growth areas are inconsistent with the State Plan, the ombudsman would return the proposed rules or regulations to the State agency with recommended amendments necessary to make the proposed rules or regulations consistent with the plan.

The 2004 legislation also provides that a State agency cannot file proposed new rules or regulations for publication in the Register unless and until the Smart Growth Ombudsman determines the proposed rules or regulations in the smart growth areas are consistent with the State Plan. These requirements may be waived upon a written determination by the Governor’s Counsel that the proposed rules or regulations are required to implement a federal or State mandate.

## RULE-MAKING DATA

### I. New Jersey Administrative Code

Number of rule pages:	25,824	(through 2009)
Volumes:	38	(37 of which are rule text)
Titles:	26	
Chapters:	925	

### II. *New Jersey Register*

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<sup>44</sup> N.J.S.A. 52:27D-10.2 et al.

	<u>2009</u>	<u>2008</u>	<u>2007</u>
Pages	4,846	7,020	5,392
Proposals	389	418	380
Adoptions	496	396	393
Other Notices	443	522	469
(Public Notices	307	404	318
Pre-Proposals	1	3	1
Petition Receipt	38	32	34
Petition Action	44	25	36
Rule Calendars	1	4	10
Executive Orders	42	31	44
Reorganization Plans	3	1	1
Expiration Date			
Extensions	5	15	17
Rule Hearings	2	7	8)
Notice Totals	1,228	1,336	1,242

(Source: Office of Administrative Law)

## IX. CONCLUSION

The Red Tape Review Group has made a series of legislative, regulatory and policy recommendations that would transform the process by which rules are promulgated. In addition, the Group has proposed measures to relieve counties, municipalities and local boards of education of the burdens of unfunded mandates, and begin the process of eliminating unnecessary boards, task forces and commissions.

Rule-making is a necessary component of the orderly administration of our State Government. Regulations protect the public health and safeguard our natural environment. Regulations often deal with complex issues that the statutory law cannot possibly envision. Laws cannot address every real world situation that may arise as a result of legislative enactments, and State agencies need guidelines to govern their administrative actions. Despite the recognized need for regulations, the process by which rules are created can and should be improved, and instances of duplication, inconsistency and uncertainty be minimized or eliminated. While the Red Tape Review Group's mandate dealt with a specific short-term freeze on regulations, many recommendations take a longer view of what is required to resolve the outstanding challenges with New Jersey's regulatory system.

The Group believes that policymakers in both the Executive and Legislative branches must work together to create a new paradigm for rule-making, under which common sense is used when drafting rules and the process employed in their promulgation and adjudications arising from the administrative law are transparent and respectful of the legitimate views of impacted parties. If such a process is successful, it can result in the creation of a regulatory system in which stakeholders may disagree with the decisions made by State agencies, but recognize that the process used to arrive at those decisions was both appropriate and fair.

The foregoing report provides a practicable and effective guide to just such a process.



**STATE OF NEW JERSEY**  
**OFFICE OF ADMINISTRATIVE LAW**

**TO:** John Hutchison  
Executive Director  
Red Tape Review Group

**FROM:** Mark J. Stanton, Esq.  
Manager, Division of  
Administrative Rules

**RE:** Survey of Other States' "Substantive  
Change upon Adoption" Standards      **DATE:** January 29, 2010

Per our discussion on January 26, 2010, I reviewed the statutes and rules of other states governing the administrative rulemaking process in order to ascertain how they address the issue of a proposing agency's ability to substantively revise proposed rule text upon adoption (essentially, their counterparts to N.J.A.C. 1:30-6.3). This memorandum sets forth the results of that research, by state, in state name alphabetical order; if information regarding a state does not appear below, that state's statutes and rules did not address "substantive change upon adoption" in the rulemaking process.

Please do not hesitate to contact me ((609) 588-6614) should you have any questions.

**ALASKA**

Alaska Stat. §44.62.200(b) provides, "A regulation that is adopted, amended, or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject." The referenced paragraph (a)(3) requires that a notice of proposal include "an informative summary of the proposed subject of agency action."



## ARIZONA

A.R.S. §41-1025 states:

"A. An agency may not submit a rule to the council that is substantially different from the proposed rule contained in the notice of proposed rule making or a supplemental notice filed with the secretary of state pursuant to section 41-1022. However, an agency may terminate a rule making proceeding and commence a new rule making proceeding for the purpose of making a substantially different rule.

B. In determining whether a rule is substantially different from the published proposed rule on which it is required to be based, all of the following must be considered:

1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead."

The "supplemental notice" referenced in subsection A is a requirement of A.R.S. §41-4022.E, "If, as a result of public comments or internal review, an agency determines that a proposed rule requires substantial change pursuant to section 41-1025, the agency shall issue a supplemental notice containing the changes in the proposed rule. The agency shall provide for additional public comment pursuant to section 41-1023." The Secretary of State's rulemaking rules, at A.A.C. §R1-1-507, sets forth the supplemental notice requirements:

"A. If an agency determines that a proposed rule requires substantial change due to either internal review or public comments, the agency shall prepare a supplemental notice for publication in the Register. A supplemental notice shall contain every Section undergoing change from the current text in the Code, as if the supplemental notice were the agency's first version of the proposed rule.

B. The supplemental notice shall contain the heading NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING in all capital letters, located one inch from the top of the page; followed by the Title, its number, and heading below the notice heading; followed by the Chapter, its number, and heading below the Title; followed by the Subchapter, its label, and

















































































































