

Legal Assistance Resource Center

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Testimony of Raphael L. Podolsky **S.B. 16 – Adoption of agency regulations** GAE public hearing – February 22, 2016

Recommended Committee action: REJECTION OF THE BILL

This bill significantly reduces the role of both the Regulation Review Committee and the public in the process for drafting agency regulations, with the effect of giving agencies far more unrestricted authority in issuing regulations than they should have. Unless the bill is changed in very substantial ways, it should be rejected. Our major concerns are:

* Operation without regulations (Section 1): **Section 1 of S.B. 16 allows an agency to ignore a statute that requires the agency to adopt regulations and to run the program without regulations (apparently with no time limit) if the department head decides that regulations are “unnecessary.”** It thus permits the agency to unilaterally override a mandatory provision in a statute adopted by the legislature. Moreover, because there will be no regulation at all, it completely exempts the program from all aspects of the regulation review process, eliminates any form of comment by the public or review by the Regulation Review Committee, and removes any requirement for the agency to eventually put a regulation in place. The more appropriate remedy for an agency that thinks regulations are unnecessary is for the agency to ask the legislature to change “shall” to “may” in the statute that authorizes the regulations or, if appropriate, to use the emergency regulation process, rather than to dispense with regulations altogether.

* Emergency regulations without time limit (Section 3): **Section 3 (I. 117-123) repeals the requirement that emergency regulations expire if a permanent regulation is not adopted within six months.** Such a repeal would eliminate the incentive for an agency to complete the regulation-writing process and would invite the agency to operate under emergency regulations indefinitely, perhaps even forever. As with Section 1, this has significant implications for both public input and legislative review. **Section 3 also attempts to prevent the Regulation Review Committee from blocking an emergency regulation by reducing its time to act from 14 days (10 days excluding Saturdays, Sundays, and holidays) to 10 calendar days.** The present 14-day time limit is already very short for getting the Regulation Review Committee together for a meeting, especially when the legislature is not in session. The time reduction would make it even more difficult.

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* Repeal of annual update of mandatory regulations still not completed (Sections 5 and 6): **Sections 5 and 6 eliminate the requirement that agencies produce a list of the regulations that they are supposed to complete but have not yet completed and an explanation of the reasons.** The purpose is to discourage agencies from sitting on regulations indefinitely. Unless agencies are deliberately not doing their job, this cannot be a burdensome requirement, because the agency must know what regulations it is supposed to be working on. It is our understanding that the agencies have already submitted a list of statutes requiring such regulations, so that all that current law effectively requires is an annual update.

* Technical amendments to regulations (Section. 2): Section 2 makes a number of changes in the process for adopting amendments that are supposed to be purely “technical,” two of which are troubling. Under existing law, a “technical” amendment can be adopted without prior notice or hearing:

First, lines 43-44 add the new “technical” category of making “a specific change to the regulation as directed by a public act.” It is less than clear that there will always be consensus on whether a “specific change” is “directed” by a public act. Taken in combination with the fact that no public notice and no opportunity is required for public comment concerning technical amendments (see lines 51-52), anything that allows a non-technical matter to be treated as technical undercuts the opportunity for public input.

Second, lines 59-61 repeal the requirement that a technical amendment for the purpose of renumbering sections be accompanied by “a correlated table of the former and new section numbers.” Such a table is obviously helpful to anyone using the regulations, and it is unclear why such a requirement should be repealed.