INDEPENDENT REGULATORY REVIEW COMMISSION

Senate Committee on Intergovernmental Operations
Public Hearing
December 12, 2019
Chairman Bedwick Statement

George D. Bedwick, Chairman
W. Russell Faber, Commissioner
David Sumner, Executive Director

Good morning Chairman Mastriano, Chairman Fontana and Honorable members of the Committee on Intergovernment Operations. Thank you for the invitation to appear before your Committee today. My name is George Bedwick and I am the Chairman of Pennsylvania's Independent Regulatory Review Commission. With me today are Commissioner Russell Faber and the Commission's Executive Director, David Sumner.

I would note that I served as a staff person for the House of Representatives from 1977 through 2007. As most of you probably know, Russ served as Chief Clerk of the Senate from 1981 to 1986 and again from 1993 through 2013. With that background, we are both very sensitive to protecting the oversight authority of the General Assembly.

You can be proud of the review process the General Assembly has put in place. A recent national study conducted by two professors at Rutgers University found the review process in Pennsylvania to rank first in the opportunity provided to the public and the legislature to impact regulatory proposals. We have attached a copy of their rankings to the material we have provided to you.

I was working for the House in 1982 when the original Regulatory Review Act was enacted. From at least the mid 1970's there was a growing

sense in the General Assembly that Administrations, both Democratic and Republican, were misusing the regulatory process. The sense was that executive agencies were going beyond their statutory authority, that they were promulgating regulations that were contrary to the legislative intent of the underlying statute and/or were placing into regulations policy provisions they were unsuccessful in getting into the legislation itself. Understanding the workload the General Assembly grapples with every session, the sponsors of the Regulatory Review Act believed that the creation of an independent commission who's sole function was to review regulations being promulgated by the executive branch with oversight and veto power in the General Assembly was the most effective way to deal with this issue. The original act permitted IRRC, a legislative commission, to bar publication of a regulation; one chamber of the General Assembly to block publication of a regulation (often referred to as a one House veto); and did not require presentment of such a resolution to the Governor for approval. The constitutionality of the Act was challenged in the case of *DER v Jubelirer*, 130 Pa Commw. 124, 567 A.2d 741 (1989). Prior to oral argument before the Commonwealth Court, the General Assembly had amended the Regulatory Review Act to require passage of a resolution by both chambers of the Legislature in order to bar publication of a

regulation, to require presentment of the resolution to the Governor for approval, and to eliminate the authority for IRRC to bar publication. An argument was raised before Commonwealth Court that the case had become moot because the amendments to the Act addressed the arguments against the alleged offending provisions. Commonwealth Court disagreed and also found the prior provisions of the Act to be unconstitutional. The decision was appealed to the Supreme Court. On appeal the Supreme Court found that the case had, in fact, been moot and vacated the decision of the Commonwealth Court. See *DER v Jubelirer*, 531 Pa 472 (1992). Although the vacated Commonwealth Court decision does not represent any precedent on the issues it discussed, I have provided the Committee with copies of that decision (and also the Supreme Court's decision) in the event the Court's reasoning or the federal cases it cites may be helpful to each of you as you consider various pieces of legislation currently proposing changes to the Regulatory Review Act.

Through the years since then the Act has been amended to heighten consideration of the impact of a proposed regulation on small businesses and provide more concrete information on any data sources relied on as the basis for a regulation, among other changes.

What we have seen occuring over the past few years and what we want you to be acutely aware of, are attempts by the Executive branch, both in Democratic and Republican administrations, to avoid the regulatory review process. These include more broadly written regulations attempting to incorporate other regulatory requirements with provisions similar to 'as determined by the deparment and published on its website', etc. Of particular concern to me is the decision in *Naylor v. Department of Public Welfare*, 54 A3d 429 (2012) a copy of which is included in the material provided to you. The issue in *Naylor* was whether the process followed by DPW of simply publishing revisions to the amounts of state supplemental payments (SSP) to severely blind, disabled and elderly indigent state residents in the *Pennsylvania Bulletin*, rather than having the revisions go through the regulatory review process denied Petitioners their rights under the Regulatory Review Act and other acts. The Commonwealth Court found that the process followed by DPW did not violate those rights. The basis for the Court's decision was that the statute DPW was acting under did not require the action they took to be done by regulation and that the process they followed was promulglated by a regulation that went through the regulatory review process and was approved. A few agencies have begun citing this decision in support of proposed

regulations that would put a process in place that would avoid the regulatory review process for future changes. We at IRRC and the legislative oversight committees should be particularly attentive to proposed regulations that would provide a process for future changes to regulations to be done outside of the regulatory review process. And if, after reviewing *Naylor* you agree with my concern about the *Naylor* decision, I would also suggest that the legal departments for the four legislative caucuses might want to work with Legislative Reference Bureau to potentially develop boilerplate language for inclusion in all relevant bills to insure that it is clear that the General Assembly requires similar types of action to be subject to the regulatory review process.

Another observation for you to consider is that often, when a new program or initiative is created by the legislature, agencies are granted temporary regulatory authority to implement them. An example where this authority was necessary and successful in its goal is the authority granted to the Gaming Control Board to establish operational and betting rules when it was first created. However, temporary rulemaking language appears to be increasingly used in recent years. Because the General Assembly is actually ceding its oversight - as well as ours, and the Attorney General's - in these cases, we note that caution should be exercised to ensure that each instance is

appropriate to be exempted from the protections of the existing review process. In many cases an alternative approach, such as directing the use of final-omitted or emergency regulation process, would still expedite the rulemaking while preserving the established role of the legislature to oversee the process.

IRRC does not take a position on any pending legislative proposals but rather is happy to serve as a resource on the current process. As an arm of the Legislature, we will do whatever the General Assembly directs us to do in reviewing regulatory proposals. But I do have one suggestion. In reviewing bills that are currently before or have been before your Committee, I believe some provisions could be included in Senate Rules while you attempt to get them enacted into the statute. Although I understand that that approach would not cover most of the more significant provisions in the various pieces of legislation, would not provide the permanancy of a statutory provision and would apply to only one chamber of the General Assembly, it would at least be a means of achieving some of the goals of the legislative proposals. By way of example, the provisions in Senator Gordner's bill requiring the Majority and Minority Chairs of a Committee to provide copies of regulations they receive to Committee members within a certain period of time and for the Committee

to meet to consider comments submitted by individual Committee members on the regulation, would seem germane for inclusion in the Rules of the Senate.

Finally, I can assure you that IRRC has not been a rubber stamp for agency regulations. In reviewing our actions over the past several years, as of the spring of this year, we have submitted comments to the agencies on proposed regulations which have resulted in changes to more than 90% of the regulations we have reviewed. Since 2008 we have disapproved 35 final regulations…almost 7% of final regulations we considered in that timeframe. This resulted in further revisions to 29 of these final regulations and approval by us based upon the new revisions; withdrawal of 6 of the disapproved regulations; and a resubmittal without change and a second disapproval by us with 5 of those regulations.

In conclusion, the wisdom and foresight of the General Assembly in its passage of the Regulatory Review Act and the various amendments to it provides Pennsylvania with a review process that is designed to produce regulations that are in the public interest through a thorough public and legislative vetting of all their impacts.

After the conclusion of today's presentation, we would be happy to answer any questions you may have.