

# spotlight

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## PERDUE'S REGULATORY EXECUTIVE ORDER

*A step in the right direction*

**KEY FACTS:** • North Carolina's regulatory environment is poor, especially in comparison with other states'.

- Gov. Beverly Perdue signed a new executive order to modify the rulemaking process and help reduce the costs of regulation.
- The executive order applies only to executive bodies in which the governor has oversight, including all Cabinet agencies.
- The executive order does several good things to reduce excessive regulation, including:
  1. Mandates cost/benefit analysis of regulations
  2. Requires agencies to identify alternatives to regulation
  3. Creates an annual review process of existing regulations to determine if the regulations should be reformed, expanded, or repealed
  4. Requires agencies to support their regulations with sound data
  5. Gives the state Office of State Budget and Management necessary oversight to ensure that agencies do what is expected of them.
- The executive order does have some weaknesses, however. They include:
  1. Some of the requirements are drafted in a vague manner, thereby allowing agencies to wiggle out of the requirements.
  2. It does not include protection for small businesses from one-size-fits-all regulation. Most states (35) and the federal government adjust regulations to meet the unique needs of small businesses, but this executive order does not address that issue.
  3. It does not protect against agencies exceeding statutory authority.
- The executive order is a good start, but much will depend on how it is implemented in practice.
- For true regulatory reform, the legislature needs to build upon the executive order and apply reforms to all agencies.

200 W. Morgan, #200  
Raleigh, NC 27601  
phone: 919-828-3876  
fax: 919-821-5117  
[www.johnlocke.org](http://www.johnlocke.org)

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**O**n October 21, 2010, Governor Beverly Perdue signed a new executive order to modify the rulemaking process and help reduce the costs of regulation.<sup>1</sup> The executive order applies to all executive bodies in which the governor has oversight, including all Cabinet agencies. It does not, however, cover Council of State agencies, such as the Department of Public Instruction, because the governor has no power to impose the executive order on those bodies.<sup>2</sup>

North Carolina’s regulatory environment is poor, especially in comparison with other states’. The state does not mandate cost/benefit analysis, require periodic review of regulations, or adjust regulations for small businesses. This *Spotlight* report briefly examines whether there are any teeth to the executive order and what, if anything, needs to be done to improve it.

**Executive Order: The Important Details**

There are some good things that the governor’s executive order does to protect against excessive regulation. According to the executive order, agencies are supposed to be guided by a statement of principles when formulating regulations.

*Select Principles from the Executive Order*

Executive Order Principle	Analysis
<p><i>Necessary for the public interest:</i></p> <p>“Rules shall only be adopted when required by federal or state law or when deemed necessary by the agency to serve the public interest.”<sup>3</sup></p>	<p>This principle is made virtually meaningless because an agency can always deem a rule to be in the public interest. As a legal matter, an agency is not able to adopt rules absent some underlying state statute, so the federal law language is unnecessary.</p> <p>The language stating that a rule must be required by state law is not as strong as it may appear. In most instances, statutory language is broad in scope, making it easy for agencies to make a compelling case as to why a rule is required to meet that broad statutory mandate.</p>
<p><i>No undue burdens:</i></p> <p>“Rules shall not impose undue burden upon those persons or entities who must comply with the rules.”<sup>4</sup></p>	<p>This is a broad principle because undue burden is not defined. Without more specifics, it does not provide a lot of teeth.</p>
<p><i>Sound, reasonable basis:</i></p> <p>“Rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall cite this information in support of regulatory proposals.”<sup>5</sup></p>	<p>This principle provides a concrete requirement — agencies must support their regulations with sound data.</p>

**Agency Requirements**

The executive order requires several actions on the part of agencies, consistent with the statement of principles.

Among them are:

Executive Order Requirement	Analysis
<p><i>Periodic evaluation and review:</i></p> <p>“Rules shall be subject to periodic evaluation and review in accordance with the procedures described in this Executive Order.”<sup>6</sup></p>	<p>The executive order creates an annual review process to “evaluate, reform, expand, or, where necessary, repeal existing rules.”<sup>7</sup> The executive order puts the Office of State Budget and Management (OSBM) in charge of the process and deciding what reforms need to be taken.<sup>8</sup> If agencies made the decisions on their own, then this review process would be pointless, because they would be hesitant to get rid of their own rules. Furthermore, in the executive order, the public has the opportunity to comment on rule reforms.<sup>9</sup></p> <p>A periodic review process such as this has long been needed in North Carolina. There are 32 states that have periodic review of regulations.<sup>10</sup> The process would be strengthened, however, if North Carolina were to follow the lead of Tennessee by placing the burden on agencies to justify the need for regulations.<sup>11</sup></p>
<p><i>Cost / Benefit analysis:</i></p> <p>“Agencies shall quantify the costs and benefits to all parties of a rule to the greatest extent possible. The level of analysis shall be proportional to the significance of the rule.”<sup>12</sup></p>	<p>Unlike the federal government, North Carolina does not have cost/benefit analysis for its regulations. The choice to adjust the level of analysis based on the significance of the rule is appropriate since agencies realistically would not be able to conduct legitimate cost/benefit analysis for all rules.</p> <p>What it means for a rule to be “significant” under this executive order is unclear, however. Clarification of that term would certainly help. Currently, OSBM considers rules to be significant if they:</p> <ol style="list-style-type: none"> <li>a. have a significant effect on the economy, state, or local funds,</li> <li>b. create an inconsistency with an action taken or planned by another agency, or</li> <li>c. raise novel policy issues.<sup>13</sup></li> </ol>
<p><i>Consideration of alternatives:</i></p> <p>“Agencies shall identify and assess available alternatives to regulation, including the use of economic incentives, information disclosure requirements, and performance standards.”<sup>14</sup></p>	<p>To have a proper cost/benefit analysis, alternatives to regulation have to be identified. The executive order recognizes that; however, the provision should have <i>expressly</i> stated that <i>no regulation</i> is also an alternative.</p>

### Independent Oversight

If no one were tasked to ensure that agencies do what is expected of them, then there would be little reason to think the executive order would have any impact.

Fortunately, the executive order does address that issue. It gives OSBM oversight to ensure that agencies do what is expected of them.<sup>15</sup> It provides no means, however, for the public to hold the agencies accountable to meet some of their requirements, such as conducting a cost/benefit analysis or supporting a rule based on sound data.

While it is questionable whether the executive order could have allowed the public to challenge these requirements in court, it could at least have instituted a public comment process so that the public could express their concerns to OSBM.

### **Executive Order: What It Needs**

In addition to the problems with the executive order already identified, it should have included:

#### *Small Business Flexibility*

One-size-fits-all regulation is very problematic, especially for small businesses. A smaller business may not have the resources or legal staff to comply with regulations in the same manner as a larger business. For 30 years, the federal government has allowed agencies to adjust regulations to meet the needs of small businesses.<sup>16</sup> In fact, most other states (35) require agencies to consider the needs of small businesses.<sup>17</sup> The executive order has no such language.

#### *Statutory Authority and Intent*

Agencies should not be able to issue new regulations regardless of their impact (good or bad) if there is not proper statutory authority. Currently, the state does have the Rules Review Commission (RRC), which reviews the statutory authority of regulations. Agencies often push the envelope, however. The executive order should have clarified that a rule may be issued only if the statutory language clearly allows the agency to issue the rule.

Often, there may be *technical* statutory authority to issue regulations, even though it is clear that the legislature did not intend for the agency to issue regulations on the matter. For example, the State Board of Community Colleges recently issued regulations on whether illegal immigrants could attend community colleges.<sup>18</sup>

While the board has power to develop regulations connected to admissions<sup>19</sup> and likely has statutory authority for these regulations, it is highly doubtful that the legislature, when delegating admissions power to the board, wanted it to make major policy decisions that are outside their purview (such as immigration). When the plain language of the statute does not mandate that an agency take action, and the intent of the legislature points away from the agency taking action, the agency should not issue rules.

The executive order should have provided more constraints on agencies in publishing rules with questionable legal authority, and it should have required that a more complete disclosure be provided to explain the legal rationale for rules.

### **Conclusion**

The executive order appears to be a good first step in trying to address the unfriendly regulatory climate in North Carolina. Much of its success will depend on how it works in practice and whether OSBM ensures that agencies follow its requirements.

For true regulatory reform, the legislature must take action next year and apply many of the principles in the executive order to all agencies. The legislature would need to amend the state's Administrative Procedure Act (APA)<sup>20</sup> that governs rulemaking in the state – the governor should make this recommendation.

Most states in the country have recognized the problem of excessive regulation, especially on businesses. The North Carolina legislature has failed to do so. It is time that North Carolina welcome businesses with sensible regulatory policy instead of scaring them away with red tape.

*Daren Bakst, J.D., LL.M., is Director of Legal and Regulatory Studies at the John Locke Foundation.*

## End Notes

1. N.C. Exec. Order No. 2010-70, Rules Modification and Improvement Program (Oct. 21, 2010), Office of Governor Beverly Perdue, [www.governor.state.nc.us/NewsItems/ExecutiveOrderDetail.aspx?newsItemID=1518](http://www.governor.state.nc.us/NewsItems/ExecutiveOrderDetail.aspx?newsItemID=1518).
2. *Ibid.*, Section 1.
3. *Ibid.*, Section 2, 1(a).
4. *Ibid.*, Section 2, 1(b).
5. *Ibid.*, Section 2, 1(d).
6. *Ibid.*, Section 2, 2(a).
7. *Ibid.*, Section 3.
8. *Ibid.*, Section 3.
9. *Ibid.*, Section 3, 1(a).
10. Daren Bakst, "Regulating the Regulators: Seven Reforms for Sensible Regulatory Policy in North Carolina," John Locke Foundation *Policy Report*, February 2010, page 4, [johnlocke.org/research/show/policy%20reports/207](http://johnlocke.org/research/show/policy%20reports/207).
11. Tenn. Code Ann. § 4-5-226.
12. *Op. cit.*, note 1, Section 2, 2(g).
13. *State of North Carolina Budget Manual*, Office of State Budget and Management, April 2009, page 172.
14. *Op. cit.*, note 1, Section 2(h).
15. *Op. cit.*, note 7.
16. Regulatory Flexibility Act of 1980, P. L. 96-354 codified at 15 U.S.C. §§ 601–612, [www.sba.gov/advo/laws/regflex.html](http://www.sba.gov/advo/laws/regflex.html).
17. *Op. cit.*, note 10.
18. Approved Rule 23 NCAC 02C .0301, North Carolina State Board of Community Colleges, *North Carolina Register*, June 1, 2010, Vol. 24, No. 23, page 2133, [www.oah.state.nc.us/rules/register/Volume24Issue23June12010.pdf](http://www.oah.state.nc.us/rules/register/Volume24Issue23June12010.pdf).
19. N.C. Gen. Stat. § 115D-5(a).
20. N.C. Gen. Stat. § 150B-1 et seq.