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## Iowa Department of Justice

December 7, 2011

Ms. Janelle Rettig, Commissioner  
Iowa Natural Resources Commission  
110 Shader Road  
Iowa City, Iowa 52245

Dear Commissioner Rettig:

Our office is in receipt of your request for an opinion of the Attorney General concerning the requirement that rules be subject to "preclearance" by the Governor's Office before being published as a notice of intended action. You point out that the Natural Resources Commission ("the Commission") is vested with rule-making authority. You acknowledge the Governor can "veto" any adopted rules; however, you question whether the Governor can block rules from being published as a notice of intended action by imposing a preclearance requirement for state agencies that are delegated rule-making authority by the General Assembly. In the circumstances which prompted your request for an opinion the preclearance of rules proposed by the Commission resulted in the Governor's Office requesting changes to the notice of intended action. The changes were made by the Commission, the rulemaking proceeded and the rulemaking is now complete. Because the issue between the Governor's Office and the Commission has been resolved, we are responding with this letter of informal advice.

The Commission is delegated broad rule-making authority to "[e]stablish policy and adopt rules, pursuant to chapter 17A, necessary to provide for the effective administration of" the following chapters: 321G(snowmobiles), 321I(all-terrain vehicles), 456A (regulation and funding for the Department of Natural Resources), 456B(wetlands), 457A(conservation easements), 461A(public lands and waters), 462A(water navigation), 462B(protected water area systems), 464A(dams and spillways), 465C(state preserves), 481A(wildlife conservation), 481B(endangered plants and wildlife), 483A(fishing and hunting licenses, contraband and guns), 484A(migratory game birds), or 484B(hunting preserves). Iowa Code § 455A.5(6)(a) (2011).

You explain that on March 21, 2011, the Commission voted to approve a series of notices of intended action to set “seasons, methods and limits” on “hunting.” Some of the notices of intended action included language intended to clarify that, with certain limited exceptions for persons with disabilities, it is illegal to hunt from a motor vehicle.<sup>1</sup> You state that the Governor’s Office returned these notices to the Commission with a request that this language be deleted. It is our understanding that the Commission then deleted the language and approved revised notices of intended action on May 12, 2011. The revised notices of intended action were published in the Iowa Administrative Bulletin on June 1, 2011. *See* Vol. XXXIII IAB No. 24, pp. 1619-23. The final rules were published on August 10, 2011. *See* Vol. XXXIV IAB No. 3, pp. 186-88.

Preclearance of agency rules is being imposed by the Governor’s office on an informal basis. Governor Branstad has not issued an executive order that spells out this requirement. Whether and at what point preclearance impacts the rule-making process to a degree that exceeds the Governor’s constitutional power may turn on how this authority is exercised. Meetings of the administrative rules contacts from the various state agencies have discussed this requirement from as early as March, 2011. Currently, it is our understanding that the administrative rules contacts are directed to send proposed rules to Larry Johnson, associate general counsel in the Governor’s Office for review prior to publication. Iowa Interactive is developing a program for all drafts of rules to be submitted electronically for preclearance from the Governor’s office. A discussion of the rule-making process may put the scope of any preclearance authority into perspective.

#### *Rulemaking Procedures*

The Governor is vested by the Iowa Constitution with “[t]he Supreme Executive Power of the State” and charged to “take care the laws are faithfully executed.” Iowa Const., art. IV., §§ 1, 9. Rulemaking, by contrast, is essentially a power delegated by the General Assembly to state agencies. *Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344

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<sup>1</sup> Iowa statutes already prohibit shooting a rifle over a public highway or shooting a shotgun, pistol, or revolver over a public roadway. Iowa Code § 481A.54(1)-(2). Existing rules, moreover, currently prohibit hunting migratory birds, deer, or wild turkey from a motor vehicle. *See* 571 Iowa Admin. Code 92.3(5)(migratory birds); 571 Iowa Admin. Code 94.7(4), 106.7(6)(deer); 571 Iowa Admin. Code 98.12(2), 99.8(2)(wild turkey). The notices of intended action involved in this rulemaking addressed deer, jackrabbits, beaver and groundhog.

(Iowa 2009); *Iowa Power and Light Co. v. Iowa State Commerce Com.*, 410 N.W.2d 236 (Iowa 1987). Promulgation of rules by agencies that have been delegated rule-making authority is an executive function. *Iowa Federation of Labor; AFL-CIO v. Iowa Dept. of Job Service*, 427 N.W.2d 443, 446 (Iowa 1988) (“[A]dministration of law, including exercise of the rule making power, is the proper function of the executive, rather than the legislative, branch of our government.”).

Both the executive and legislative branches of government have roles in rulemaking. Since 1974 rulemaking in Iowa has been governed by the Iowa Administrative Procedure Act (“the IAPA”) which sets out the powers and duties of the various participants, including the state agencies, the Governor, the Attorney General and the General Assembly. Your question about the imposition of a preclearance requirement by the Governor’s Office focuses on the appropriate balance of authority between the executive and legislative branches.

Rulemaking by a state agency is formally initiated by “submitting” a notice of intended action to the Administrative Rules Coordinator (“the Coordinator”) and the Administrative Code Editor (“the Editor”). Iowa Code § 17A.4(1) (2011). The Coordinator is a position created by statute as part of the Governor’s Office. *See* Iowa Code §§ 7.17. It is the express function of the Coordinator to bring rules to the attention of the governor at various stages of the rule-making process. *Id.* (“The administrative rules coordinator shall receive all notices and rules adopted pursuant to chapter 17A and provide the governor with an opportunity to review and object to any rule as provided in chapter 17A.”). The Editor is the custodian of the Iowa Administrative Bulletin, the Iowa Administrative Code and the Iowa Court Rules. Iowa Code § 2B.19(2). Upon submission of a notice of intended action, these state officials are charged with certain statutory duties: the Coordinator “shall assign” an ARC number to each rule-making document and the Editor “shall publish each notice meeting the requirements” of chapter 17A in the Iowa Administrative Bulletin. Iowa Code § 17A.4 (1).

Publication of the notice of intended action is the starting point for subsequent steps in the formal rule-making process. From publication of a notice of intended action in the Iowa Administrative Bulletin, the public has “not less than twenty days to submit data, views, or arguments in writing.” Iowa Code § 17A.4(1)(b). Further, on a timely request in writing by “twenty-five interested persons, by a governmental subdivision, by the administrative rules review committee, by an agency, or by an association having not less than twenty-five members” the agency must provide an opportunity for oral presentations. *Id.*

Although rulemaking formally begins with a notice of intended action, information about proposed rules may become public before the notice of intended action is ever filed. The Uniform Rules of Agency Procedure require agencies to create a public rule-making docket when a rule-making proceeding is "anticipated." A rule-making proceeding is anticipated, in turn, "from the time a draft of proposed rules is distributed for internal discussion within the agency." *See* Uniform Rules: Agency Procedure for Rulemaking No. X.3(17A). Accordingly, agencies that have adopted the Uniform Rules of Agency Procedure for rulemaking may engage the public about the subject of the rulemaking at an earlier point in time than the filing of the notice of intended action.

Rules are not promulgated by state agencies in a vacuum. Although rulemaking is initiated by state agencies, the agencies are not the sole participants in the rulemaking. There are numerous political hurdles between filing a notice of intended action and implementing an adopted rule. Rules may be subject to objections, or may be delayed in the course of a rulemaking, or may be invalidated after the rulemaking is completed. The Governor, the Attorney General, and the Administrative Rules Review Committee ("the Committee") are all authorized to file an objection if they find the rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency." Iowa Code § 17A.4(6)(a). An objection will not halt a rulemaking; however, the objection does shift the burden of proof to the agency. If the rule is challenged in court the agency will bear the burden of proof and will be charged with court costs and attorney fees if the rule is ultimately invalidated by the court. *Id.* Even if no objection is filed, adoption of a rule may be delayed by a two-thirds vote of the Committee who may either impose a seventy-day delay or impose a delay extending through the adjournment of the next regular session of the General Assembly. Iowa Code §§ 17A.4(7), 17A.8(9).

Rules that proceed through rulemaking after an objection is filed or a delay is imposed by the Committee nevertheless may be invalidated after adoption either through rescission by the Governor within seventy days of the effective date, Iowa Code section 17A.4(8) ("The governor may rescind an adopted rule by executive order within seventy days of the rule becoming effective."), or through nullification by the General Assembly, Iowa Const. art. III, § 40 ("The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly.").

#### *Role of the Administrative Rules Review Coordinator*

In addition to the exercise of the power to object to noticed rules and to rescind

adopted rules, the Governor's Office has an active role in the course of a rulemaking through the statutory responsibilities of the Coordinator. Under chapter 17A the Coordinator: receives the notice of intended action submitted by the agency to initiate rulemaking, Iowa Code § 17A.4(1)(a); may request a regulatory analysis of the proposed rule, Iowa Code § 17A.4A(1); receives adopted rules for filing, Iowa Code § 17A.5(1); receives requests for review of agency rules, Iowa Code § 17A.7(2)(a); is responsible, along with the Editor, for tracking information about waivers or variances from rules granted by state agencies, Iowa Code § 17A.9A(4); and makes an initial determination whether a proposed rule "may cause a service or product to be offered for sale to the public by a state agency" in competition with private enterprise, Iowa Code § 17A.34.

#### *Gubernatorial Oversight of Rulemaking*

The growth and complexity of agency rules have prompted Iowa governors to address the rule-making process through a number of executive orders. On September 14, 1999, Governor Vilsack issued four executive orders that dramatically impacted the rule-making process. Executive Order No. 8 directed each agency with rule-making authority to develop a "plan" for a comprehensive review of all agency rules specifically considering need, clarity, consistency with legislative intent and statutory authority, cost and fairness. This assessment was to result in recommendations for modifications of the agency's body of rules. The Governor directed the Coordinator to meet with each agency to review its recommendations. The process was to culminate in a final report by each agency no later than December 31, 2002.

Executive Order No. 9 prospectively directed the agencies to approach rulemaking with specific considerations in mind, including the costs and benefits of not regulating at all. When agencies choose among alternate regulatory approaches the Governor directed agencies to select approaches that maximize net benefits and are most equitable in the result. "To the extent reasonable and practicable" the Governor directed agencies to base decisions on "scientific, technical, economic, and other information concerning the need for, and the consequences of, the intended rule." Further, Executive Order No. 9 required each agency to "narrowly-tailor its rules to impose the least possible burden on society, including individuals, businesses of different sizes, and other entities (including small businesses and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." Additionally, Executive Order No. 9 directed each agency to develop a "regulatory plan" listing each "regulatory action" the agency reasonably expected to issue to include among other elements a statement of the agency's regulatory

objectives and priorities, a description of each contemplated regulatory action with the alternatives to be considered and a preliminary estimate of the costs and benefits of the action, and a statement of the need for each action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk relates to other risks within the jurisdiction of the agency.

Executive Order No. 10 established a "Quality in Rule-Making Committee" to design and administer a program to familiarize agency personnel with, and equip them to satisfy, all legal requirements applicable to the rule-making process.

Finally, Executive Order No. 11 directed each agency to adopt a uniform waiver rule that would allow a rule adopted by an agency to be waived to the extent allowed under applicable statutes based on consideration of the hardship or injustice of applying the rule to the person seeking the waiver, the consistency of a waiver with the public interest, and the impact of a waiver on the substantial legal rights of other persons. A statutory process for the public to obtain waivers of agency rules was enacted the following year. *See generally* Iowa Code § 17A.9A.

Twelve years later in March, 2011, Governor Branstad issued Executive Order No. 71 and directed state agencies to include a "jobs impact statement" in the preamble to proposed rules. The jobs impact statement must:

identify the objective of the proposed rule and the applicable section of the Code of Iowa that provides specific legal authority for the agency to adopt the rule; and identify and describe the cost that the Department or Agency anticipates state agencies, local governments, the public, and the regulated entities, including regulated businesses and self-employed individuals, will incur from implementing and complying with the rule; and show whether a proposed rule would have a positive or negative impact on private sector jobs and employment opportunities in Iowa; and describe and quantify the nature of the impact the proposed rule will have on private sector jobs and employment opportunities including the categories of jobs and employment opportunities that are affected by the proposed rule, the number of jobs or potential job opportunities and the regions of the state affected; and identify, where possible, the additional costs to the employer per employee for the proposed regulation; and include other relevant analysis requested by the Administrative Rules Coordinator.

Over the years these executive orders demonstrate that Iowa governors have been keenly aware of the impact of agency rules on our society and have taken steps to shape the values that agencies must weigh in pursuing rulemaking.

#### *Limitations on Agency Rulemaking*

By contrast, in other States across the country concern about rulemaking has caused governors to impose harsher limitations on the rule-making process. In some States governors have gone so far as to suspend rulemaking altogether. In November, 2010, Governor Gregoire of Washington suspended “non-critical” rulemaking until January 1, 2012 for all agencies that report to the governor. The Office of Financial Management was directed to “publish guidelines identifying circumstances in which rulemaking may proceed.” Wa. Executive Order No. 10-06. Similarly, in Nevada in January, 2011, Governor Sandoval “froze” all proposed administrative regulations “propounded by an Executive Branch agency, department, board or commission within the purview of the Governor” until January 1, 2012, subject to limited exceptions. During this period no new regulations could be proposed. Nev. Exec. Order No. 2011-01. *See also* N.M. Exec. Order No. 2011-001 (all proposed rules and regulations by agencies under the authority of the governor suspended for 90 days subject to limited exceptions).

Other governors have created new review mechanisms intended to improve proposed rules but with the potential to block rules that do not pass political muster. In Florida two executive orders issued by Governor Scott in January and April, 2011, established the “Office of Fiscal Accountability and Regulatory Reform” within the Governor’s office and expressly required state agencies that are under the direction of the Governor to obtain the approval of this new entity before developing new rules or amending or repealing existing rules. *See* Fla. Exec. Order Nos. 11-01, 11-72.

A Florida resident filed suit challenging the authority of Governor Scott to establish an entity that could block agency rules. The suit alleged that the new process effectively halted a rulemaking that would have expedited the procedures for obtaining food stamps. In a per curiam decision with two dissents the Florida Supreme Court held that Governor Scott exceeded his constitutional authority and “impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (AFAR) must first *permit an agency to engage in the rulemaking* which has been delegated by the Florida legislature.” *Whiley v. Scott*, 2011 WL 3568804, at \*1 (Fla. Aug. 16, 2011) (emphasis added). The Court concluded that, absent an amendment to the Florida

Administrative Procedure Act or other delegation of authority to the Governor by the Florida legislature, Governor Scott exceeded his constitutional authority and violated separation of powers in issuing Executive Orders 11-01 and 11-72. *Id.*<sup>2</sup> The Court reasoned that, although the Florida Constitution vests “supreme executive power” in the governor and grants the governor “supervisory authority” over the departments of state government including the authority to replace state officials who serve at his pleasure, the Florida Constitution does not empower the governor to thwart a legislative delegation of rule-making authority to state agencies by creating a new entity and authorizing that entity to halt a rulemaking.

The Court concluded that Governor Scott’s executive orders violated separation of powers “to the extent each suspends and terminates rulemaking by precluding notice publication and other compliance with Chapter 120<sup>3</sup> absent prior approval from OFARR—contrary to the Administrative Procedure Act—infringe upon the very process of rulemaking and encroach upon the Legislature’s delegation of its rulemaking power as set forth in the Florida statutes.” *Id.* at \*8 (emphasis in original). In reaching this conclusion the Court specifically rejected the theory that the vesting of “supreme executive power” in the governor under the Florida Constitution is sufficient to grant the governor authority to give binding directions to state agencies in carrying out a legislative delegation of rule-making power. Even the gubernatorial power to remove a state agency official, the Court noted, is “not analogous to the power to control” when “the Legislature has expressly placed the power to act on delegated authority in the department head, and not in the Governor or the Executive Office of Governor.” *Id.* at \*10.

The tension between a governor and state agencies over legislatively delegated rule-making authority as described by the Florida Court would no doubt be sharpest when the General Assembly has mandated rulemaking by an agency rather than delegated

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<sup>2</sup>A similar legal challenge was filed to an executive order issued by Governor Pataki in New York in November, 1995. Governor Pataki created the Office of Regulatory Reform to review proposed rules before publication. This Office had the power to prohibit publication of rules effectively blocking rules from being promulgated. Ultimately, the litigation was dismissed due to lack of standing by the plaintiffs. *Rudder v. Pataki*, 93 N.Y.2d 273, 689 N.Y.S.2d 701 (1999). The Office was discontinued legislatively in 2011. Governor Cuomo issued an executive order in April, 2011, that rescinded Governor Pataki’s 1995 executive order. See N.Y. Exec. Order No. 14.

<sup>3</sup> Chapter 120 refers to the Florida Administrative Procedure Act.



discretionary authority to engage in rulemaking which the agency may or may not choose to exercise. *See, e.g.*, Iowa Code § 272C.4(5) (“Each licensing board shall have the following duties in addition to other duties specified by this chapter or elsewhere in the Code . . . Define by rule those recommendations of peer review committees which shall constitute disciplinary recommendations which must be reported to the board if a peer review committee is established.”). In this circumstance the General Assembly has not only delegated rule-making authority to a state agency, but also directed the state agency to act. Should the preclearance requirement block publication of a notice of intended action in a mandatory rulemaking, the legislative delegation would clash directly with the Governor’s assertion of authority over state agencies.

The circumstances underlying the recent rulemaking by the Commission do not present a clash between the Governor and the state agency over rulemaking. We do not read *Whiley* to suggest that a governor’s review of proposed rules before publication and a dialogue with the promulgating agency is constitutionally prohibited. Certainly nothing in *Whiley* suggests that separation of powers obligates a governor to remain silent except for the functions that are expressly provided in statutes, i.e., to lodge an objection to noticed rules, Iowa Code section 17A.4(6), or to rescind adopted rules at the completion of the rulemaking process, Iowa Code 17A.4(8). Indeed, the rules may be brought to the attention of the governor by the Coordinator before an ARC number is assigned and before the notice of intended action is published in the Iowa Administrative Bulletin. *See* Iowa Code § 7.17. No substantial separation of powers issues arise if the governor requests changes before the notice of intended action is published and the agency agrees to comply.

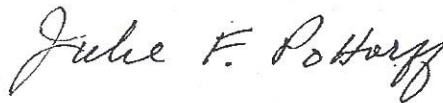
Courts have recognized that a chief executive may engage in a dialogue with agencies in the initial phases of rulemaking. *See, e.g., Massachusetts et al. v. Environmental Protection Agency et al.*, 549 U.S. 497, 513-14 (2007) (“According to EPA, unilateral EPA regulation of motor-vehicle greenhouse gas emissions might . . . hamper the President’s ability to persuade key developing countries to reduce greenhouse gas emissions.”); *Motor Vehicle Manufacturers Assoc. et al. v. State Farm Mutual Automobile Insurance Co. et al.*, 463 U.S. 29, 59 (Rehnquist, J., concurring in part and dissenting in part) (“The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. . . A change in administration . . . is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”).

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In practical terms a governor's threat to object to noticed rules or to rescind adopted rules could certainly motivate state agencies to accommodate changes requested by a governor at the start of a rulemaking. Of course, an agency could decide to proceed with a rulemaking despite concerns expressed by the governor. The publication of the noticed rules and the public comments submitted in writing and at a public hearing may shed light on significant policy issues even if the rulemaking ultimately results in the rescission of the adopted rules.

In summary, we do not doubt that the Governor can require a notice of intended action to be submitted for review in advance of filing and publication. At this point a political dialogue between the Governor and a state agency prior to publication of the notice of intended action is appropriate. The Governor is not a mere bystander who must remain silent except to file an objection to noticed rules, or to rescind adopted rules. But we doubt that the Governor can flatly refuse to publish an otherwise valid notice of intended action that has been submitted by an agency particularly under circumstances when rulemaking has been mandated by the General Assembly. Should problems develop over issues in the notice of intended action during the preclearance process, we encourage the Governor's Office and state agencies to involve our office in resolving them.

Sincerely,



JULIE F. POTTORFF  
Deputy Attorney General

cc: Brenna Findley