

APPROVAL #83

CHAPTER 850

LAWS OF 1990

MEMORANDUM NO. \_\_\_\_\_

SENATE BILL \_\_\_\_\_

ASSEMBLY BILL 10271-A

10271--A

R. R. 600

# IN ASSEMBLY

March 19, 1990

Introduced by M. of A. SANDERS, PROUD, SCHIMMINGER, ROBACH, TONKO --  
Multi-Sponsored by -- M. of A. BENNETT, CANESTRARI, HILLMAN,  
LAFAYETTE, MAYERSOHN, NOLAN, SEABROOK, SIEGEL, WEISENBERG -- (at  
request of the Governor) -- read once and referred to the Committee on  
Governmental Operations -- reported and referred to the Committee on  
Rules -- amended on the special order of third reading, Ordered re-  
printed as amended, retaining its place on the special order of third  
reading

AN ACT to amend the state administrative procedure act, the legislative  
law, the executive law, chapter 695 of the laws of 1984, amending the  
state administrative procedure act, the executive law and the legisla-  
tive law relating to regulatory review by the office of business per-  
mits and regulatory assistance and chapter 610 of the laws of 1987,  
amending the executive law, the legislative law and the state adminis-  
trative procedure act relating to executive and legislative review of  
rule making, in relation to extending the office of business permits  
and regulatory assistance and to clarify certain provisions relating  
to notice of proposed rule making and to repeal paragraphs (b) and (e)  
of subdivision 1 and paragraph (c) of subdivision 4-a of section 202  
of the state administrative procedure act relating to rule making  
procedures

IN THE SENATE BY S. 7174-A MCHUGH

DATE RECEIVED BY GOVERNOR:

7/19

ACTION MUST BE TAKEN BY:

7/31

DATE GOVERNOR'S ACTION TAKEN:

JUL 25 1990

000001

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SENATE VOTE 58 Y 0 N

HOME RULE MESSAGE Y  N

DATE 6/30/90

BILL IS DISAPPROVED

ASSEMBLY VOTE 119 Y 2 N

DATE \_\_\_\_\_

DATE 6/29/90

COUNSEL TO THE GOVERNOR

A.10271-A

NEW YORK STATE ASSEMBLY  
TWO HUNDRED THIRTEENTH SESSION

REPRINT  
DATE: 06/29/90

DATE: 06/29/1990  
TIME: 11:42:33 AM

BILL: A10271-A

R.R. NO: 600 SPONSOR: SANDERS (MS)

Extends provisions relating to the office of business permits and regulatory assistance; repealer

Y	Abbate PJ	Y	Gantt DF	NAY	Orloff C
Y	Abramson E	Y	Genovesi AJ	Y	O'Shea CJ
Y	Anderson RR	ABS	Gottfried RN	Y	Parment WL
Y	Balboni MA	Y	Graber VJ	Y	Parola FE
ABS	Barbaro FJ	Y	Grannis A	EOR	Passannante WF
Y	Barnett HW	ABS	Green RL	Y	Pataki GE
NAY	Barraga TF	Y	Greene A	Y	Pheffer AI
Y	Becker GR	ABS	Griffith E	Y	Pillittere JT
Y	Behan JL	Y	Harenberg PE	EOR	Pordum FJ
Y	Bennett LE	Y	Harris GH	Y	Prescott DW
Y	Bianchi IW	Y	Hasper J	Y	Proskin AV
Y	Bonacic JJ	Y	Hawley RS	Y	Proud G
Y	Boyland WF	Y	Healey PB	Y	Rappleyea CD
Y	Bragman MJ	Y	Hevesi AG	ABS	Reynolds TM
ABS	Brennan JF	Y	Hikind D	Y	Robach RJ
Y	Brodsky RL	Y	Hill EH	Y	Rosado D
Y	Brown HC	Y	Hillman MC	Y	Saland SM
ABS	Bush WE	ABS	Hinchey MD	Y	Sanders S
EOR	Butler DJ	Y	Holland JR	Y	Sawicki J
Y	Canestrari RJ	Y	Hoyt WB	Y	Schimminger RL
Y	Casale AJ	ABS	Jacobs RS	ABS	Schmidt FD
Y	Catapano TF	EOR	Jenkins C	ABS	Seabrook L
Y	Chesbro RT	Y	Kaufman SB	ABS	Sears WR
ABS	Clark BM	Y	Keane RJ	Y	Seminerio AS
Y	Cochrane JC	ABS	Kelleher NW	Y	Siegel MA
Y	Colman S	Y	King RL	ABS	Silver S
Y	Connelly EA	Y	Koppell GO	Y	Singer CD
Y	Connors RJ	Y	Lafayette IC	Y	Straniero RA
ABS	Conte JD	Y	Larkin WJ	Y	Sullivan EC
Y	Cooke AT	Y	Lasher HL	ABS	Sullivan PM
Y	Coombe RI	Y	Leibell VL	Y	Sweeney RK
Y	Crowley J	ABS	Lentol JR	Y	Tallon JR
Y	D'Andrea RA	Y	Lopez VJ	Y	Talomie FG
ABS	Daniels GL	Y	Luster MA	Y	Tedisco J
Y	Davidson DR	Y	Madison GH	Y	Tocci RC
Y	Davis G	Y	Marshall HM	Y	Tokasz P
Y	Dearie JC	ABS	Martinez I	Y	Tonko PD
ABS	Del Toro A	Y	Mayersohn N	Y	Vann A
Y	Diaz HL	Y	McCann JW	Y	Vitaliano EN
Y	DiNapoli TP	Y	McGee PK	Y	Warren GE
Y	Dugan EC	Y	Miller RH	Y	Weinstein HE
Y	Eannace RJ	Y	Murphy MJ	Y	Weisenberg H
Y	Eye AO	Y	Murtaugh JB	Y	Weprin S
ABS	Farrell HD	Y	Nadler J	Y	Wertz RC
Y	Faso JJ	EOR	Nagle JF	Y	Winner GH
Y	Feldman D	Y	Nolan CT	Y	Yevoli LJ
Y	Flanagan JJ	Y	Norman C	Y	Young GP
Y	Friedman G	Y	Nortz HR	Y	Zaleski TM
Y	Frisa D	ABS	Nozzolio MF	Y	Zimmer MN
Y	Gaffney RJ	Y	O'Neil JG		Mr. Speaker

YEAS: 119

NAYS: 2

CONTROL: 39059842

CERTIFICATION: /S/ FRANCINE M. MISASI  
CLERK OF THE ASSEMBLY

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN, ABS=ABSENT,  
ELB=EXCUSED FOR LEGISLATIVE BUSINESS, EOR=EXCUSED FOR OTHER REASONS.

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1990

SENATE JOURNAL  
JUN 30 1990  
PAGE 134

# ASSEMBLY

The Assembly Bill  
by Assem. SANDERS Calendar No. 1767 Assembly No. 10871-A  
Entitled: " Sen. Rept. No. \_\_\_\_\_

AN ACT to amend the state administrative procedure act, the legislative law, the executive law, chapter 698 of the laws of 1984, amending the state administrative procedure act, the executive law and the legislative law relating to regulatory review by the office of business permits and regulatory assistance and chapter 610 of the laws of 1987, amending the executive law, the legislative law and the state administrative procedure act relating to executive and legislative review of rule making, in relation to extending the office of business permits and regulatory assistance and to clarify certain provisions relating to notice of proposed rule making and to repeal paragraphs (b) and (e) of subdivision 1 and paragraph (c) of subdivision 4-a of section 202 of the state administrative procedure act relating to rule making procedures

"was read t  
The Pre  
having bee  
days, and it  
three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	17	Mr. Babbush			21	Mr. Markowitz	
	43	Mr. Bruno			58	Mr. Masiello	
	25	Mr. Connor			46	Mr. McHugh	
	40	Mr. Cook			23	Mr. Mega	
	61	Mr. Daly			30	Mrs. Mendez	
	47	Mr. Donovan	EXCUSED		22	Ms. Montgomery	
	44	Mr. Farley			42	Mr. Nolan	
	31	Mr. Galiber			27	Mr. Ohrenstein	
	13	Mr. Gold			14	Mr. Onorato	
	32	Mr. Gonzalez			36	Mrs. Oppenheimer	
	37	Mrs. Goodhue			11	Mr. Padavan	
	26	Mr. Goodman			29	Mr. Paterson	
	39	Mr. Gray			54	Mr. Pery	
	18	Mr. Halperin			56	Mr. Present	
	6	Mr. Hannon			55	Mr. Quattrociocchi	
	48	Ms. Hoffmann			41	Mr. Rolison	
	10				50	Mr. Seward	
	4	Mr. Johnson			60	Mr. Sheffer	
	53	Mr. Kehoe			9	Mr. Skelos	
	33	Mr. Korman			20	Miss Smith	
	52	Mr. Kuhl			19	Mr. Solomon	
	2	Mr. Lack			35	Mr. Spano	
	1	Mr. LaValle			57	Mr. Stachowski	
	28	Mr. Leichter			45	Mr. Stafford	
	38	Mr. E. Levy	EXCUSED		12	Mr. Stavisky	
	8	Mr. N. Levy			3	Mr. Trunzo	
	51	Mr. Libous			7	Mr. Tully	
	49	Mr. Lombardi			34	Mr. Veella	
	15	Mr. Maltese			59	Mr. Volker	
	24	Mr. Marchi			16	Mr. Weinstein	
	5	Mr. Marino					

AYES 58  
NAYS 0

Ordered, that the Secretary deliver said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

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NGA

B-201

BUDGET REPORT ON BILLS  
TEN-DAY BILL

Session Year 1990

A(121)

SENATE

Introduced by:

ASSEMBLY

No.

M. of A. Sanders, Proud  
Schimminger, Robach, Tonko

No. 10271-A

Law: State Administrative Procedures Act      Sections: 102, 202, 203  
Legislative Law      88  
Executive Law      893

Division of the Budget Recommendation on the above bill:

Approve:\_\_\_ Veto:\_\_\_ No Objection: X No Recommendation:\_\_\_

1. Subject and Purpose:

To extend the existence of the Office of Business Permits and Regulatory Assistance (OBPRA) through December 31, 1995; authorize OBPRA to review substantially revised rule makings; add new requirements in rule-making procedures for State agencies, including emergency rules; and clarify certain existing rule-making requirements contained in the State Administrative Procedures Act (SAPA).

2. Summary of Provisions:

Effective October 1 next succeeding the date on which it shall have become law and shall apply to all rule-making notices submitted to the Secretary of State on or after such date, this bill would amend SAPA, Executive Law and Legislative Law as follows:

- Clarify the definition of substantial revision.
- Consolidate distribution requirements for rule-making notices and information.
- Require that an assessment of public comment contain a summary and analysis of issues raised and significant alternatives suggested and a statement of the reasons why any significant alternatives were not incorporated into the rule.
- Clarify which versions of a proposed rule must be compared in determining whether there have been any changes in the text of the rule as adopted.
- Require an agency to identify in its notice of adoption whether any notices of revised rule making had been submitted for the rule and specify when any such notices were published in the State Register.
- Allow a notice of emergency adoption to serve as a notice of revised rule making.

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- Require an agency to specify in greater detail the emergency that exists which necessitates the adoption of a regulation on an emergency basis.
- Clarify that materials incorporated by reference are not to be considered in determining whether the text of a rule exceeds 2,000 words.
- Require an agency to include in its regulatory impact statement a best estimate of the costs of the rule, the information and methodology upon which the estimate is based, and if the estimate is incomplete, the reasons why a more complete estimate cannot be provided.
- Clarify which versions of a proposed rule must be compared in determining whether a revised regulatory impact statement or a revised regulatory flexibility analysis is necessary and delete distribution requirements for revised regulatory impact statements.
- Authorize OBPR to conduct a review of substantially revised rule makings similar to that currently conducted for proposed rule makings.
- Clarify that an agency may not amend, suspend or repeal a rule that has been filed with the Secretary of State but is not yet effective if such amendment, suspension or repeal would constitute a substantial revision of the rule as adopted.
- Authorize the Administrative Regulations Review Commission to review revised rule makings and make recommendations to an agency based on its review of such rule makings.
- Extend OBPR through December 31, 1995.

3. Legislative History:

Executive Law Section 893, Section 21 of Chapter 698 of the Laws of 1984 and Section 22 of Chapter 610 of the Laws of 1987 provide for the termination of authority for the Office of Business Permits and Regulatory Assistance, effective December 31, 1990.

4. Arguments in Support:

- a. The Office of Business Permits and Regulatory Assistance (OBPR) is scheduled to sunset on December 31, 1990. Although it is a compromise to permanence, it could be argued that the continuation of OBPR for an additional five years would demonstrate the State's strong commitment to business development and regulatory fairness in the State.

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- b. Currently, an agency is required to publish a notice of revised rule making to inform the public of any substantial revisions in the text of a proposed rule prior to its adoption, and is required to provide the public with an opportunity to comment on the revised rule. OBPRA does not conduct a review of substantially revised rules similar to that conducted for initially proposed rules. It is believed that the new proposed rule-making procedure for rules that undergo substantial changes during the rule-making process would eliminate a loophole in the current rule-making process, making substantially revised rules that are subject of notices of revised rule making subject to review by OBPRA.
- c. Currently, an agency is allowed to provide an explanation in lieu of a cost analysis when submitting a regulatory impact statement. It could be argued that strengthening the cost analysis requirements to include a cost estimate and the information and methodology upon which the estimate is based (if the agency cannot fully estimate the implementation and continuing compliance costs of the proposed rule to the State, its local governments, regulated persons or the agency) would encourage agencies to involve regulated parties earlier in the development of a rule so that they are able to provide the necessary cost estimates. Additionally, these new requirements could provide the public with more information about the cost implications of new regulations.
- d. There are those who believe that agencies have been abusing their ability to adopt rules on an emergency basis. It is believed that abuses should decrease when agencies are required to document in significantly greater detail the nature, location and expected duration of the public health, safety or general welfare emergency which necessitates the adoption of an emergency rule. In addition, requiring agencies to provide an explanation of why the emergency circumstances necessitate that the public not be provided its minimum opportunity to review and comment on the rule before it takes effect should make clearer why those rules adopted on an emergency basis really are necessary.
- e. It is believed that the establishment of a new requirement that agencies publish an assessment of public comments when a rule is finally adopted or readopted on an emergency basis will ensure that agencies consider seriously any significant alternatives suggested to their rule makings and provide the public with a better understanding of why the agency chose one rule-making alternative over any other significant alternatives suggested.

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- f. It could be argued that the consolidation of distribution requirements provides agencies with a uniform distribution list for all rule-making information, thereby making it easier for agencies to comply with their distribution requirements.
- g. It is believed that the technical changes in SAPA will clarify legislative intent and make a more orderly rule-making process.

5. Possible Objections:

- a. It could be argued that elements in the Legislature like to hold the existence of the Office of Business Permits and Regulatory Assistance hostage to gain further control by the Legislature of the rule-making process.
- b. Some may argue that the establishment of a new proposed rule-making procedure for rules that undergo substantial changes during the rule-making process does not go far enough because it does not include a monitoring system for determining whether a revised rule meets the review criteria of SAPA Section 202 (c) against which an initial proposal is measured.
- c. It is believed that agencies will view the increased requirements for emergency rule making as an additional burden.
- d. By establishing a new requirement that agencies publish an assessment of public comments when a rule is finally adopted or readopted on an emergency basis, it could be argued that the requirement also places an additional requirement on agencies to state in their assessments of public comments the reasons why any significant alternatives suggested to a rule making were not incorporated into the rule.

6. Other State Agencies Interested:

All State agencies which engage in rule making pursuant to the State Administrative Procedure Act would be interested.

7. Other Interested Groups:

Business and other advocacy groups such as the Business Council of New York State, Inc. and the National Federation of Independent Businesses may be interested.

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8. Budget Implications:

This legislation would clarify the reporting requirements State agencies must comply with pursuant to SAPA. There may be some additional costs for preparing these documents; however, under current law agencies should be able to recover most of these costs through copying fees.

9. Recommendation:

This legislation would make more explicit many of the rule-making requirements that State agencies must comply with under the State Administrative Procedure Act (SAPA), and would extend the Office of Business Permits and Regulatory Assistance (OBPRA) review authority to 1995. Although there may be additional burdens placed on agencies engaged in promulgating rules according to SAPA, we have no objection.

DATE: July 18, 1990

EXAMINER: \_\_\_\_\_



Disposition:

Chapter No.

Veto No.

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NE



A 10271

STATE OF NEW YORK  
DEPARTMENT OF STATE  
ALBANY, N.Y. 12231-0001

GAIL S. SHAFFER  
SECRETARY OF STATE

M E M O R A N D U M

DATE: July 24, 1990

TO: Hon. Evan A. Davis  
Counsel to the Governor

FROM: James N. Baldwin  
Executive Deputy Secretary of State

SUBJECT: A. 10271-A (M. of A. Sanders, et al.)  
Recommendation: No Objection

You requested our comments and recommendation on the above-numbered bill.

The bill is an omnibus bill largely concerning procedures to be followed in adopting rules under Article 2 of the State Administrative Procedure Act (SAPA). Some of the changes are merely clarifying amendments which confirm procedures already being followed under administrative interpretation of L. 1989, c. 355. Other amendments introduce new requirements respecting notices regarding rules which are published in the State Register. Because this Department is impacted by the new requirements both as a State agency and as the agency which publishes the State Register and advises other agencies thereon, this memorandum will deal largely with these new requirements.

The sponsors' legislative memorandum accompanying the bill is an accurate summary of the bill's provisions and the "justification" in the memorandum gives an explanation of the effect of the changes. Expansion on these explanations is desirable from this Department's view.

Section 1 of the bill amends § 102(9) of SAPA which defines a "substantial revision" of a rule for purposes of requiring a notice of revised rule making. The bill attempts to narrow the current exclusion contained in the definition, for changes which merely define or clarify the text, by requiring that the changes "not materially alter its purpose, meaning or effect." This language is already in the definition and in our view merely underscores the words "materially alters its purpose, meaning or effect." The underscoring, nonetheless, may be necessary for we believe some agencies have not published notices of revised rule making when they should have.

CC3017

The effect of bill §§ 2,3, 9 and 11 is to consolidate the notice requirements given to certain State agencies in new subdivision (6-a) of § 202 of SAPA. In establishing the notice requirements in subdivision (6-a), the law now will require each agency now receiving certain notices to receive all notices printed in the State Register and the notice requirements are now explicitly stated, whereas present law leaves some notice requirements to implication.

Bill § 4 amends § 202(5)(b) which requires an assessment of public comment to now require a summary and analysis of the issues raised by comment and a statement of reasons why significant alternatives were not incorporated into the rule. These additional requirements will increase the work in preparing the assessments and will increase the lineage in the State Register to some degree.

Bill § 7 amends § 202(6) of SAPA which concerns the notice of emergency adoption to require a statement whether the notice also constitutes a notice of revised rule making (this would be in cases of a readoption of an emergency rule) and if so, to include the information required in a notice of revised rule making. This new requirement will require an additional notice of emergency adoption form. Our existing notice of emergency adoption form also combines a notice of proposed rule making. Now we will require a form for notice of emergency readoption combined with a notice of revised rule making.

Bill § 8 amends § 202(6) to require a disclosure of specific reasons and justifications for adopting a rule on an emergency basis. The requirement will require a redrafting of our current form of notice and the inclusion of this requirement on the new form mentioned above. Again, this requirement will increase the size of the State Register and the production time for its composition.

Bill § 10 amends § 202(7) concerning rule text requirements to provide that in determining whether the text of a rule exceeds 2,000 words and thereby requiring that a summary of the rule be published with a notice rather than the text, material incorporated by reference is not to be counted. This is contrary to the current interpretation of the Department of State. Where a rule incorporates referenced text now, and exceeds 2,000 words including the referenced text, a summary must be provided. We are of the opinion that our present interpretation makes for greater clarity because the substance of the rule may well be entirely derived from referenced material. The Department of State will need to revise its manual for the State Register.

Bill § 12 amends § 202-a(3)(c) of SAPA to require, in addition to the now required statement of the cost of implementation of a proposed rule in the regulatory impact statement, a statement of the information and the methodology used to arrive at the projected cost or estimate of cost. This requirement will increase the length of the regulatory impact statement to be printed in the State Register.

Bill § 15 amends § 202-c of SAPA to extend the review authority of the Office of Business Permits and Regulatory Assistance to Notices of Revised Rule Makings.

Bill § 16 amends § 203(2) of SAPA to limit the authority of agencies to amend, suspend or repeal a rule between the time the adopted rule has been filed with the Secretary of State and the publication of the notice of adoption to situations in which the amendment, suspension or repeal does not constitute a substantial revision of the rule. This provision is somewhat anomalous in that it would be impossible to repeal an adopted rule without it being a substantial revision. This Department has never been persuaded that this device of changing a rule between the time of filing and the time of publication should be available.

Bill § 17 amends § 88 of the Legislative Law to extend the review authority of the Administrative Regulations Review Commission to revised rule makings.

Bill §§ 18, 19 and 20 extend the existence of the Office of Business Permits and Regulatory Assistance from December 31, 1990 to December 31, 1995.

If this bill is approved, it will be effective October 1, 1990. In our estimation, this provides a very short time for State agencies to become familiar with this law. This Department will be able to deal with the changes and have forms in place by that time; however, we anticipate some confusion on the part of the agencies and we will necessarily have to cope with mistakes which are inevitable.

The State Register will undoubtedly increase in size because agencies are being required to provide additional information in the rule making process, i.e., provide detailed information on their cost estimate in the Regulatory Impact Statement; provide information on why an agency must adopt a rule on an emergency basis; and provide analysis of issues raised in the Assessment of Public Comment. This additional information will increase our production time as well as increase the number of pages in the State Register. Additionally, we will be required to provide at least one new form. These increases will increase the administrative costs of the Department of State.

Our overall view of this bill is mixed. The purely clarifying amendments improve the statute, but are unnecessary in that they are already reflected in forms and instructions. The provisions which require greater information from agencies probably improve the review process of the agencies charged with review of proposed rules and the general public, but they introduce new obstacles to the rule making process. The requirement that agencies justify emergency adoptions in greater detail will not reduce the number of emergency adoptions, it will merely place a greater demand upon the agencies to explain the emergency adoption which will take place. Unquestionably, OBPR and

ARRC should review notices of revised rule making. The existence of OBPRRA should be extended. The alteration of the "2,000 word" rule test for printing of summaries is not advisable, and the new limitation upon revised adoptions to revisions which are not substantial revisions makes the provision for revised adoption meaningless. Our recommendation of no objection is based upon a number of worthwhile provisions in the bill despite the provisions about which we have expressed reservations.

There is no fiscal impact to localities from this bill. The Department of State will incur greater production costs in producing the State Register. Most State agencies will incur some greater cost in preparing notices.

This Department does not object to the approval of this bill.

JNB/ER;dkd