Governor Abbott Rulemaking?

June 22, 2018 Clarification Letter

&

Senate Bill 1995

June 22, 2018 Clarification Letter by Chief of Staff Luis Saenz

1. Governor Abbott is "clarifying" the process for review of all new rules proposed by state agencies. (But, no Governor has required pre-clearance in Texas History).

(a) Prior to commencing Notice and Comment Rulemaking…(secret deliberations)

(b) Submit all new proposed rules to the Governor's Office

(c) In order for the Governor to provide a dispassionate "second opinion" on the costs and benefits of the rules.

(i) Does that mean the Governor will say "yes" or "no" or "go back and make these changes"?

(ii) And on what basis? The rule is inconsistent or outside the authority of the agency and/or FOR WHATEVER REASON HE WANTS?

Is Governor Pre-Clearance Happening?

- 1. We do not know…….it has been totally private
- 2. Is the Governor merely giving suggestions or “yes” or “no” or “modify”? …..again, no one knows.
- 3. A PIA request for documents was filed related to this process and the response of the Governor was “No, on the basis of attorney-client privilege”?????
  - (a) Will someone please make another request and be willing to pursue a challenge to his asserted exception?

Senate Bill 1995

- 1. For the first time in Texas history, the Legislature delegated express powers to the Governor to ultimately approve or disapprove select rules of select agencies.
- 2. However, the Legislature set forth the specific procedures to be followed, Tex. Occ. Code, Section 57.105-57.106.
- 3. The Legislature required the Governor’s analysis of the rules to be set forth in writing and available to the public. Tex. Occ. Code, Section 57.106(f).

The Really Big Question……

- Is the Legislature's action an implied repudiation of the Governor's assertion that he has the inherent power to review all agencies rules and to do so in private?
  - ie. He only has such power if the Legislature expressly delegates it to him?
- The Administrative Procedure Act does not expressly delegate any power to the Governor to participate in rulemaking. Is that also an implied repudiation of the Governor having review power? Also, the APA expressly allows legislative committees to comment. Does that fortify the implication of no power of the Governor to affect agency rulemaking in general?

- If these implications can be made, is the Governor agreeing to them by his willingness to sign into law SB 1995?

Coverage of SB 1995

- 1. It only applies to a state agency with a governing board that is controlled by persons who provide services that are regulated by the agency, Tex. Occ. Code, Section 57.102, and

- 2. Who have the power to issue, deny or revoke licenses for that type of service, Tex. Occ. Code, Section 57.105(a).

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Governor Abbott Rulemaking?

Also available as part of the eCourse
2020 Advanced Administrative Law eConference

First appeared as part of the conference materials for the
15th Annual Advanced Texas Administrative Law Seminar session
"Rulemaking: Governor Abbott's Participation in the Process"