1952

The 1952 State Agency Law

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The legislation enacted by the 1952 General Assembly under the foregoing title is hardly as complete as its title indicates. Yet this legislation does much toward placing the law of Kentucky in the statutory front among the states of this nation with respect to the law governing the regulatory activities of administrative agencies. It comprises but twelve sections or less than two pages in the coming 1952 Kentucky Revised Statutes, and deals only indirectly with administrative procedure and judicial review; but its provisions relating to the filing of regulations, its general scheme of distribution, and its provisions for study of Kentucky's regulatory problems are in keeping with current concepts of administrative law.

The Original Filing Act

In the short history of statutory administrative law, Kentucky has helped set the pace in some respects in the trend toward improved regulatory administration. The original filing act, entitled "State Agency Regulations Filing Act," proposed by Louisville's Senator Stanley Mayer and enacted in 1942, put Kentucky among the first three states with both filing and publication legislation on the books.\(^3\)
The proposal of the original filing act grew out of efforts on the part of the Bar in general to formalize administrative procedures and Mayer's experiences in practice before what was then the Division of Motor Transportation in the Department of Business Regulation. In the particulars covered, the provisions were patterned after the laws of the few states having statutes of this kind.4

In its definitions of "state agency" and "regulation,"5 its arrangement for filing6 and publication7 of regulations, and its prescription of the legal significance of filing regulations,8 this Act was quite complete. In calling for an Administrative Register and Code9 this Act was only two years behind the Federal Register Act,10 and, as subsequent developments in this field have shown, somewhat over ambitious. The progressive attitude toward this regulations program is reflected in the assignment of a separate chapter heading to this subject in the Kentucky Revised Statutes. The title of that chapter, "Enforcement and Review of Administrative Orders", is somewhat limited in meaning, but the cross-reference note which follows expresses anticipation of future uniform legislation concerning regulatory administration.11

The success of this 1942 filing act has been pretty much like the success of most initial attempts to deal with the highly complex problems associated with regulatory administration. The law provided a central repository22 with which to file regulations to serve as notice of their content to the public, and to assure uniform, impartial administrative action, while, at the same time, entitling the regulations to statutory legal presumptions. But in making the Secretary of State such a repository the Act included

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4 The 1942 Filing Act was drafted by Albert Greene under the supervision of the Commissioner of the Court of Appeals, Robert K. Cullen, then Reviser of Statutes.
5 Ky. Rev. Stat. 13.010 (1) and (2) (1948).
9 Ky. Rev. Stat. 13.040 (1) and (2) (1948).
11 This title and cross-reference note appear on the first page of Chap. 13 of each of the Ky. Rev. Stat. editions prior to 1952. The note reads as follows. "NOTE: The following references are to sections dealing with the enforcement or review of orders issued by specific administrative agencies, as to which there may in the future be uniform legislation that will be compiled in this chapter."
no measures enabling that official to handle the regulations properly. Most conspicuous by its absence was a provision giving the Secretary of State authority to require conformance to standards of form or substance. Never of prime importance in the work of that office, the function of handling administrative regulations degenerated into a fourth-rate duty that made the personnel of that office wonder why it was bothered with at all.

The primary objective of the 1942 Act—to make the content of administrative regulations available to the public—fared little better. In spite of the rather elaborate provisions for a Codification Board and the publication of an Administrative Code and periodical supplements, together with substantial efforts to make the program work, there was little satisfaction with the degree of availability of administrative regulations produced under this arrangement. The Act was in effect four years before the first edition of the Administrative Code was published (1946) and nine years before the second edition of that Code was published (1951). Also, it soon became obvious that the output of new regulations was not high enough to warrant supplementation of the Code frequently enough to keep it up to date. Only two supplements were published during the ten years which have followed since the 1942 enactment. Furthermore, many of the agencies adopted pamphlets of material already printed elsewhere which were not reprinted in the Code to save space and costs. These factors reduced the value of the Code and Register to many legal practitioners, and gave rise to one of the most oft-repeated complaints about regulatory administration in this state, that is, about the unpublished status of so many regulations. Again, the fact that since the Codification Board was not the central repository, it could not enforce compliance with its own rules as to form and classification of administrative materials, has been a real hindrance to effectual publication of the regulations. Then, of course, a lack of interest on the part of so many administrative authorities and a general avoidance of the entire matter of administrative law by

38 These two supplements were published in January and July of 1949.
39 See the prefaces of the 1946 and the 1951 Administrative Codes and other pages in those Codes such as p. 151 of the 1951 Administrative Code.
most members of the Bar, acted as both cause and effect of this unsatisfactory scheme.

The lack of success in the publication scheme has been in turn reflected in the case law of this state. Administrative regulations have not been the subject of judicial inquiry as often as might have been expected and have seldom been given the benefit of the legal presumptions and judicial notice to which they are entitled by statute.

That feature of the 1942 Act which has been considered most unique by students of administrative law is that which provides that the costs of the publications were to be pro-rated among the agencies "according to the volume of regulations made by each state agency and compiled in such publication."\textsuperscript{17} It has been suggested that this may have encouraged some agencies to continue their work \textit{sans} regulations, \textit{sans} filing, \textit{sans} all formalities; but this writer knows of no reliable evidence in support of this suggestion.

The move for re-legislation in this field seems to have come primarily from another general complaint that there are so many agencies with so many different procedures that it is very difficult to present a case properly before them, and equally difficult for the Courts to properly review the procedures involved. During 1951, at the instigation of some members of the Court of Appeals and the Judicial Council, as well as a few members of the Franklin County Bar who had practiced considerably before administrative agencies, a survey of the administrative law picture in Kentucky was begun by the Legislative Research Commission to simplify the procedure picture.\textsuperscript{18} The immediate objective was preparation of legislation standardizing all or part of procedures before administrative agencies, which legislation was to be presented to the 1952 General Assembly for its consideration. The size of the task made it necessary to limit the immediate objective to judicial review of administrative acts, that is, to standardization of procedures for appealing from administrative adjudication. A com-

\textsuperscript{17} Ky. Rev. Stat. 13.040 (4) (1948).

\textsuperscript{18} Law Clerks of the Court of Appeals prepared a summary of administrative case law for this survey while the Legislative Research Commission prepared a survey of the problem along with the statutory developments of regulatory administration in general.
committee of legislators was named to review the work done and make recommendations.¹⁹

The pressure of other Assembly business, and the recognition that all phases of the administrative process should be dealt with as a whole and only after examination of the special problems of each agency, caused this committee to decide that the immediate objective should be limited to still narrower gains and at the same time expanded to a broader perspective. Accordingly, the statute as finally introduced in the Senate by Louis Cox attempted to correct only mechanical defects and to provide a basis for complete alignment of the whole of regulatory administration in the near future. The bill went through the Assembly with the rush of late bills, encountering little opposition. It constitutes Chapter 163 of the 1952 Legislative Acts of Kentucky and became effective on June 19, 1952, repealing all of the original act as set out in Chapter 13 of the Kentucky Revised Statutes (1948).

The New Law

The 1952 State Agency Law is broader in scope than the 1942 act in that it covers the same matters specifically and deals with additional matters generally. Like the old law, it includes no direct provision as to judicial review of administrative acts. It does, however, contain one provision dealing directly with holding hearings, after notice to interested parties, before adopting new regulations.²⁰ This provision represents the only new phase of the administrative process dealt with directly in the new State Agency Law. Except for a provision calling for the drafting of additional legislation for the 1954 General Assembly and miscellaneous sections dealing with such matters as personnel, funds, etc., the rest of the statute deals with the filing and distribution of administrative regulations and the effect of such filing and distribution. Thus where discussions on administrative law usually divide into the trilogy of administrative rule-making, administrative adjudication, and judicial control of administrative action, a discussion of the 1952 State Agency Law centers about the rule-making function which in turn, after definitions, divides quite naturally into pro-

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¹⁹ Franklin Senator Louis Cox, appointed Robert Burke of Louisville, Clifford Smith of Frankfort, and Donald Maloney of Lexington to this committee.
cedures for the adoption of regulations, the filing of regulations and their date of effect, their distribution, and the consequence of filing regulations. The most important changes effected by the new law relate to filing, effective date, and distribution of regulations.

In dealing with state agency laws the matter of definitions is even more important than it is in dealing with most statutes. The definitions of “Agency” and “Regulation” are substantive to the whole problem inasmuch as they determine who and what are subject to the provisions of the agency law which by its nature is designed to cut across organizational lines and the lines of activity of agency administration. The definitions in the 1952 Act are essentially the same as those contained in the original filing Act. One new feature of the definition section of the 1952 law is the inclusion of the usual proviso, “unless the context otherwise requires.”

By virtue of its title and its first definition, the new administrative procedure law is set up in terms of state administrative agencies with a definition of agency so broad as to encompass every size and unit of government up to and including departments. The definition here is actually merely a statement of inclusion: “‘State agency’ includes any officer, department, bureau, division, board, authority, agency, commission or institution of this state except the judicial and the legislative branches.” There is no limitation to those authorities which are authorized by law to promulgate regulations such as is found in the Model State Administrative Procedure Act, unless such limitation is found in another provision that “Each regulation shall include a citation of the authority pursuant to which it . . . was adopted.”

The problem of just what authorities are to be governed by this legislation is not serious here because no specific affirmative duties are prescribed by the act. The purport of this law is that if an agency wants its rules to have the force of law and be entitled to presumptions of law, then it must comply with this act. The choice is with the agency. A more refined concept of what the

23 National Conference of Commissioners on Uniform State Laws, Model State Administrative Procedure Act, 1946, sec. 2 (3).
The statute contemplates in its use of the term "state agency" can be seen only in the light of the other provisions.

The other provisions of this law narrow the area of interest to those agencies whose activities are regulatory in nature. These provisions are nearly all in terms of "regulations" which are described more by a statement of exclusion than by definition:

"'Regulation' includes every rule or regulation made by any state agency, except a rule, regulation or order which:
(a) Relates only to the organization or internal management of the state agency;
(b) Is directed to a specifically named person or to a group of persons, and does not apply generally throughout the state;
(c) Is duly served by the state agency in the manner authorized by law upon the person or persons designated therein as the party or parties legally affected;
(d) Establishes or fixes rates or tariffs; or
(e) Relates to the use of public works, including streets and highways, under the jurisdiction of any state agency when the effect of such rule, regulation or order is indicated to the public by means of signs or signals."24

There is also a provision for filing materials specifically excepted with the approval of the Statute Revision Commission.25 The approval here involved would seem to be an informal administrative one, inasmuch as the determination of whether a particular regulation falls into such an optional class or not can be made only upon individual examination of it at the time it is submitted for filing.

The lack of constructive definition leaves much to be determined about the nature of regulations which are required to be filed. Difficulties are most likely to occur in connection with exceptions (b) and (c). The former involves a question as to when a group of persons is specifically named and what constitutes general application throughout the state. The latter raises the question whether constructive notice of a regulation by a state agency is meant to be a substitute for the filing of the regulation in every case.

Procedure for Adoption of Regulations

The provision encouraging agencies to provide notice and a hearing before promulgation of new regulations is closely akin to a corresponding provision in the Model Act and needs little explanation. "Where practicable to do so, state agencies are encouraged to give notice, to interested persons, of proposed regulations, and conduct hearings upon the proposed regulations prior to adoption thereof." The hortatory nature of this provision is a reflection of uncertainty regarding this matter and recognition that the necessity for a hearing, the kind of hearing needed, and the kind and amount of notice most suitable are factors that may well vary according to the kind of work administered by the agency, or the kind of regulation under consideration. A hearing on the adoption of a regulation requiring a copy be filed in triplicate would be as wasteful as it would be pedantic. Too much formality in an Unemployment Insurance Commission hearing would discourage participation on the part of some persons interested in the hearing. Notice suitable for a hearing of the Parole Board would be unsuitable and inadequate for a hearing of a Board of Claims.

While notice and hearing are generally essential to due administrative process, there is often more than one way to satisfy these essentials and assure more procedural fairness in the doing. A letter setting forth a proposed regulation and asking for criticism thereof will obtain more participation on the part of interested parties scattered over distant points than will a centralized public hearing. The treatment given the subject of procedures for adoption of regulations in the 1952 law is hardly adequate to guarantee due process in rule making, but in the final analysis the best interests of fair play depend to a large extent on the spirit and attitude of the administrator.

Filing Regulations and Their Effective Date

The Act of Filing.—The focal point of the process of rule making is, of course, the procedure of filing the resultant regula-

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26 National Conference of Commissioners on Uniform State Laws, Model State Administrative Procedure Act, 1946.
28 The law in Indiana and Ohio, however, require public hearing for adoption of regulations. Nathanson, op. cit. p. 260.
tion with an independent place of official records as a further guarantee of its legality and stability; and to serve notice to the public that such regulation is in force. This is the least controversial aspect of administrative procedure legislation. Both the 1942 and the 1952 acts put it bluntly that "no regulation . . . shall become effective until . . . filed. . . ." Such provision seems to go to the question of legal effectiveness only, for doubtless, regulations have been administered effectively without benefit of filing simply because their legality was not contested. It will be of interest to learn what the Courts will do with a case wherein a party is charged with violation of an unfiled regulation of which he had actual notice. Inasmuch as rule making is primarily a legislative sort of function, it seems absolutely essential that the filing step be required as an approximation to the safe-guards which are a part of the procedure whereby statutes are recorded and made public, imparting stability to them and making them available to the public.

The Central Repository.—In selecting a central repository the original filing act did the more usual thing in designating the Secretary of State for this purpose. One of the three major changes made by the 1952 law was to make the office of the Statute Revision Commission the place of filing and to assign the duties of endorsing the filing date on the regulations and maintaining public files with suitable indexes to that office. Here again is a recognition that promulgation of regulations is basically a legislative process evident in the removal of the custodial duties in regard to administrative regulations to an agency which is independent of the administrative branch of the State Government and responsible primarily to the Legislature.

Probably most important is the fact that the office charged with the responsibility of accepting regulations for filing is the same office that is given the power to adopt rules "governing the

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* The Federal Register Act anticipates this problem by providing that no rule is valid as against any person who has not had actual knowledge thereof until it has been filed and made available for public inspection. 49 Stat. 502; 44 U.S.C.A. (Supp. 1940) sec. 307.
manner and form in which regulations shall be prepared . . .” with an express grant of power to refuse to accept for filing any regulation which does not conform to its rules. The Statute Revision Commission is in a position to enforce standards in the preparation of regulations. This may require a gradual adjustment in some areas because systems of files and reproduction have been built up in some agencies and cannot be readily changed without working a hardship on the agencies. There is a complementary provision that the Statute Revision Commission “shall furnish advice and assistance to all state agencies in the preparation of their regulations and revising, codifying and editing existing or new regulations.”

The provision for filing regulations in the office of the Statute Revision Commission represents a somewhat unique arrangement among filing systems of the various states, being shared only by the state of Kansas. In relation to the act of filing it is a logical arrangement by reason of the nature of regulations and the status and responsibility of the office so designated. The various characteristics of this office qualify it rather well as a neutral central repository. While it is an independent agency its office and its work are close in many ways to the offices of the administrative branch which would serve to keep it somewhat in sympathy with administrative endeavor. In its work with statutes and serving the Bench and Bar it keeps abreast of legal perspective. Most important, its responsibility to the Legislature assures regard for the public interest second only to that assured in the elective offices. The only danger here is that the duties and responsibilities connected with this work might become subordinated to the other work of the office as they did in the office of the Secretary of State. However, as long as the views regarding regulatory administration presently held by the Commission members and the administrative head of this office remain unchanged, this danger should not materialize.

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36 Book of the States, op. cit., p. 162. However, it is not uncommon for the publication work to be assigned to offices which compile state laws.
37 The 1952 members of the Statute Revision Commission are L. B. Alexander, Chairman, S. Y. Trimble IV, Blakey Helm, and Clinton M. Harbison.
38 The Reviser of Statutes is now Mr. Robert W. Meagher.
Delayed Effective Date.—In making another one of the three major changes the new law provides that no regulation become effective “. . . until thirty days after . . . copies of the regulation are filed . . .” in the absence of an emergency situation.\(^{39}\) In making this provisional delay the filing section of the law has run nearly the full formalization course in the matter of giving the regulated public an opportunity to know about in advance and prepare for new regulations. The Kentucky law provides more of this kind of protection than does the law of most of the states with filing acts.\(^{40}\) The only additional protection that could be provided is to require that the regulations will not be effective until after they are published or distributed.\(^{41}\) While the protection afforded by this arrangement is desirable, it is doubtful whether it is worth the price of delaying the work of the agencies by making the effective date of their regulations wait until a new publication is completed or until complete distribution is made; or the risk of making the effective date depend on the uncertainties of reproduction and mailing arrangements.

The flat thirty-day waiting period does not reflect the recognition of the various kinds of regulations and activities of the many agencies which was reflected in the provision regarding rule-making procedures. The only way in which the agency can vary the date on which regulations take effect in the absence of an emergency is to extend the effective date to more than thirty days.

While the majority of regulations are of the type which should be subject to just such a waiting period, there are those which might well be exempted. To use an earlier sample again, a regulation requiring that a complaint be filed in triplicate need hardly be subjected to this delay. Non-compliance with this type of regulation is far more likely to result from a failure to consult the agency rules on this point than it is from a lack of a thirty-day notice.\(^{42}\) Similarly, many non-controversial listings and routine amendments filed as regulations involve no deprivation of rights

\(^{40}\) California is the only state known to have a comparable provision. Cal. Govt. Code, sec. 11422.
\(^{42}\) Procedural regulations are exempt from provisional delay in California. Cal. Govt. Code, sec. 11422. On the other hand, a ten day delay for all general regulations is presented in the Wisconsin Constitution, Art. IV, sec. 16.
of any kind and so might be properly exempted from the delay. However, determination of controversiality is a discretionary one so the error in this delayed provision is on the safer side. Its worst effect is to invoke circumvention of this provision and so weaken the law.

The Emergency Provision.—An essential kind of flexibility in the effective date provision is found in the emergency clause "... that when the state agency finds that an emergency exists, and such finding is concurred in by the Governor, by written endorsement upon the original regulation, a regulation may become effective immediately upon being filed in the office of the Statute Revision Commission." The provisional delay, being an invariable and a month in length, makes it imperative that there be some prescribed way to act forthwith where circumstances require it. The power of the administrative to put regulations into effect immediately where the public interest requires it is as essential as the power in the legislative to have legislation go into effect forthwith upon its being signed by the Governor.

The power to avoid the provisional delay by way of the emergency clause is, of course, subject to abuse. The requirement that the Governor concur in the emergency finding is designed to reduce this abuse potential. This requirement accomplishes its purpose only to the extent that administrators are reluctant to appear late with their regulation promulgation or to make unnecessary requests for the Governor's endorsement. Usually it amounts to little more than a formality because of a natural inclination on the part of the Chief Executive to go along with the agency finding of an emergency. This kind of a provision has been strengthened in Michigan by a requirement by the Governor of a covering letter setting out reasons in support of the agency's finding of an emergency. There seems little reason for confining the benefits of a statement of reasons to a covering letter. It is submitted that such reasons should be stated in the declaration of the finding of an emergency by the agency. In

44 Ky. Const., sec. 55.
46 Ibid, p. 47.
this way the public, as well as the Governor, is advised of the reasons for the suspension of the thirty-day waiting period, assuring healthy publicity for the reasons therefor. The emergency provision specifies a concurrence in the finding of an emergency thus calling for more than mere approval. With respect to both the agency's finding and the Governor's endorsement it should always be stressed that invoking the emergency provision is an affirmative step in deprivation of the rights of the public to advance notice of regulations, and thus should not be used in the absence of clear and convincing proof that such deprivation is in the best public interest.47

While the emergency provision is a necessary allowance, it is apt to be used as often for non-emergency situations as for emergency ones. It is used in the regulation of some matters such as protecting a species of fish in streams, when the need for a regulation of a particular kind cannot be anticipated, requiring immediate regulatory effectiveness in the normal course of events and not as an emergency at all. Where extensive or substantial rights are not involved such regulations should be exempted from the provisional delay in some other manner. In some cases they can be interpreted as falling without the definition of "regulation" set up in the first section of the law and thereby not subject to the provisions governing regulations.

The emergency provision is also a temptation for an agency which has carefully revised its entire body of regulations and dislikes the thought of having to go through another administrative month under the old unsatisfactory rules. This temptation should always be resisted, however, inasmuch as such a revision amounts to a great number of new regulations making it all the more important that the public have the benefit of the thirty-day delay.48

The Legal Consequence of Filing Regulations.—The benefit gained from filing regulations with a central repository is not limited to giving regulations the force of law. The law prescribes

47 All of these ideas have been incorporated into statements of emergency finding prepared by this writer for both the agencies and the Chief Executive. The agency statement includes specification of the reasons for the emergency and the Governor's statement stresses the special allowance nature of the gubernatorial endorsement.

48 The Department of Motor Transportation is to be commended for resisting this temptation in its additionally commendable complete revision of its department regulations.
that both judicial notice and specific legal presumptions attach to the regulations with the act of filing them. Specifically, the act provides that the filing of a regulation raises "a rebuttable presumption that: (1) The regulation was duly ... promulgated; (2) ... duly filed ... and made available for public inspection at the day and hour endorsed on it; and (3) All requirements of this Act and the rules prescribed thereunder ... have been complied with." It is further provided that "the Courts shall take judicial notice of any regulation duly filed under the provisions of this Act after the regulation has become effective." There is a caveat that compliance with this Act "does not dispense with the requirements of any other law necessary to make the regulation effective."

These presumptions were all included in the original act but some parts of this provision in the original act were left out of the new. The omitted parts injected the factor of publication into the presumptions. The old section began "The filing or publication of a regulation shall raise a rebuttable presumption. ..." (Italics Writer's) and included among the presumptions one that "the copy of the regulation printed is a true and correct copy of the original regulation. ..." The omission of the publication factors from these presumptions grants the benefits of these presumptions to the single step of filing. For this one step, presumptions are made as to steps taken by the agency before and at the filing of the regulation; and as to steps taken before, during, and after the filing by the Statute Revision Commission in compliance with the various duties assigned to it by the law. Here it becomes especially clear that the filed regulation is equally effective in respect to those who have not received benefit of publication or distribution of regulations as it is to those who have received such notice. It is the filing of a regulation that is its force and not the dissemination of its content.

The omission of the publication factors, however, leaves unsolved a problem which the original act attempted to solve; that is, the matter of satisfactory evidence of filing. Properly certified copy of the Kentucky Revised Statutes is declared by a section of

\[\text{5 Ky. Rev. Stat. 13.100 (1), (2), (3) (1952).}\]
those statutes to constitute prima facie evidence of the law. In contemplation of an Administrative Code and Register as provided for elsewhere in the Act, the original filing act included a similar provision to the effect that presentation of a regulation so published entitles the presentor to a rebuttable presumption that the published matter was true and correct.

The present Act, contemplating a new scheme of distribution which mixes the publications printed pursuant to the original Act with other methods of distribution of future regulations, leaves the distributed product without benefit of any prescribed legal advantages before a court of law. The new distribution system does not lend itself to the usual kind of certification as to the contents of any given set of regulations because of its unbound changeable form. It would seem that, of necessity, presentation to a court of a regulation in any form must be sufficient to set in motion the judicial notice and legal presumptions prescribed in the law itself; otherwise the prescription of these advantages is useless. The adverse party can check the prescribed regulation against his own materials for correctness, and the presumptions raised by the presentation are all rebuttable. Clearly this matter of evidence of a regulation is an area of some doubt which will have to be resolved by future developments in actual practice and operation, and perhaps ultimately by judicial decision.

This problem of notice and presumptions is complicated somewhat by the fact that there are no provisions for furnishing copies of regulations to courts. Whereas statute books and criminal and civil code books are provided for the use of judges in some instances, the provisions which do this were written prior to the existence of a compilation of regulations, and subsequent legislation has not included any provision for adding compilations of administrative regulations to this list of legal materials furnished by the state. Until further legislation is enacted, these regulatory materials must be obtained by the courts in the same manner as by private individuals.

Publication or Distribution of Regulations

The third of the three major changes made by the new state agency law is in its provisions for a completely different system
whereby administrative regulations are made available to parties interested in obtaining them. Although there is a recognition that recently printed compilations of regulations in the form of the Administrative Code were on hand at the time of the enactment of this law, there are no provisions for future publications of such a Code. Instead the new law provides for a subscription system of distribution by which interested parties subscribe to the regulations of individual agencies. The basis for this arrangement is prescribed in these terms:

“(1) Any person who desires to receive copies of regulations filed with the Statute Revision Commission may at any time file with the commission an application containing his name and mailing address, together with a list of the names of the agencies a copy of whose regulations he desires to receive. For each agency whose regulations he desires to receive he shall pay, with his application, a fee of five dollars. Thereupon, for a period of one year from the date of the application, the Statute Revision Commission shall mail to the applicant, forthwith after filing, a copy of each regulation of the designated agency or agencies filed during the year.”

This change to a subscription system offers two advantages over the Code and Register system of distribution. Designed as it was to include the regulations of all agencies, the Code made it necessary to buy all regulations, regardless of what the purchaser's needs were. Furthermore, after buying the Code the purchaser still did not have all regulations because the regulations of some of the agencies were not included because of their bulk and/or availability direct from the agency. The first advantage of the new system is that the subscriber can buy the regulations of only those agencies in which he is interested without having to purchase the regulations of many other agencies.

The second advantage of subscription distribution is in the schedule by which the interested parties receive the regulations. The Code being published only twice within ten years with only two non-cumulative supplements in the same period left the interested party's library of regulations incomplete nearly all of the time. Regulatory administration's chief raison d'être lies in its

ability to deal in a detailed manner with a problem and to alter the course of regulatory events as often as necessary. Keeping posted on this kind of activity requires a flexible, punctual system of distribution. The new distribution provision provides the basis for such a system by having a copy of each regulation mailed to the interested party "forthwith after filing." Thus an interested party receives a copy of a regulation before it becomes effective in most cases.

The distribution provision in the new law calls for a bare minimum in what the applicant is to receive. Simple as are the steps of reproducing each new regulation and mailing to each subscriber, they would apparently satisfy the literal requirements of the statute. However, the most persistent purpose of this kind of legislation is "to make the content of administrative rules readily and certainly available to interested persons,"57 and it is open to question whether simply reproducing and mailing out regulations would accomplish that purpose. To make their content "readily" available regulations must be distributed in a usable, convenient form. It is common to all written materials that as an unorganized collection their value is quite limited. To make their content "certainly" available regulations must be distributed in such a way as to insure correctness, thoroughness, and completeness.

The simplicity of the statutory directive concerning what should be provided to the subscribers allows much freedom in what is actually to be done under this subscription system. The form and manner in which the distribution provisions of this Act are to be administered should be worked out with a view toward the future, a feeling for the immediate needs of the practitioner, and a hand on the monies available at the time for distribution purposes. The flexibility inherent in the 1952 distribution provisions should never be changed except to increase it. There are nearly as many different schemes for distribution as there are state agency acts and none has been found to be completely satisfactory. The distribution provision in the new Kentucky law is not quite like any other, and could be the basis for the most successful system yet attempted.

57 Heady, op. cit., p. 29.
The advantage of ordering per agency applies to regulations already filed as well as to regulations filed in the future. "Any person desiring to receive a copy of all regulations of any state agency in force as [of] a particular date shall be furnished the same by the Statute Revision Commission upon his paying the cost thereof."\textsuperscript{58}

The actual work involved in providing such material is much more complicated than it appears from this simple provision. It involves reproduction of rather voluminous material for some of which none of the mechanical steps have been done. Even the assembling and editing steps have never been performed for any of those regulations not printed in the 1951 Administrative Code. Omitted partly because of their bulkiness they constitute a sizeable task from the standpoint of reproducing all effective regulations filed since 1942. It is to be remembered that regulations procured under this provision are up to date only at the time they are obtained. Then there is, of course, a real difficulty in determining what should be included in the cost of such operations and in apportioning that cost between those who placed the first such order and those who might order later.

The great problem in connection with the distribution scheme would seem to be in connection with the subscription fee. The simple prescription that "for each agency . . . he shall pay . . . a fee of five dollars" becomes rather complex when thought of in terms of the statute's definition of agency. The various examples of agencies contained in the definition overlap and fit one into the other, making it impossible to tell what is to be considered the fee unit. This flat-rate charge does not take into consideration the importance of the agencies involved or the volume of the regulations it promulgates.

Worse yet this simple provision becomes quite unreasonable in terms of the number of agencies, potential and real, filing regulations. Nearly forty agencies had filed regulations prior to the time the law became effective. There are nearly one hundred authorities in the state government which have statutory authority to adopt rules and regulations and over one hundred such offices which might conceivable become involved in this program. It is

evident that a literal computation of fees would make the cost of subscribing to the regulations of all agencies almost prohibitive. Adjustments made in the matter of subscription fees should be aimed toward furthering the primary objective of state agency legislation to make administrative regulations "readily and certainly" available. Inasmuch as the volume of regulations promulgated by most agencies in the past have not been large, adjustments should be able to take the form of less expense to the purchasers of regulations. It should be remembered that the cost of each regulation reproduced is decreased with an increase in the number of copies purchased.

Any publication or distribution scheme must of course face up to the matter of the agencies having some distribution scheme of their own. In any sizeable agency there is a need to furnish copies of all regulations to all subordinate units, branch offices, field agencies, and the like. The problem here arises with an extension of such distribution beyond agency personnel to the public persons affected. Of course if the persons affected are a limited group which can be served a copy of the regulation in a manner authorized by law, the regulation is not required to be filed. But where the group is more general or the distribution is not complete, the regulation is within the purview of the publication arrangements of this law. The Administrative Code grants full recognition to such distribution by agencies by not compiling regulations which have been prepared for distribution by the agencies. The objection to agency distribution is, of course, that it is detrimental to the financial success of any centralized distribution scheme.

A very practical answer to this problem is that since the primary purpose of the state agency law is to make the regulations available, having more than one system of distribution only serves to accomplish this purpose the better. There are, after all, distinctions between what would be received from the agency on request and the service subscribed to under the new law. The material furnished directly from the agency would be complete

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59 The right of the agencies to make their own distribution in addition to the central distribution is prescribed by law in California. In Missouri and North Dakota, agency distribution is the only distribution. Heady, op. cit., pp. 33, 35.

60 It has been declared that agency distribution "reaches more people" than does the central distribution in California. Heady, op. cit., p. 40.
and up to date only at the time of the order, whereas the centralized service system keeps a set of regulations complete at all times almost automatically. The service material will probably be better organized and maintained in a convenient form, while agency materials are often but an unorganized collection and sometimes include obsolete rules. Agency material so requested has been known to include regulations which have never actually been filed and even to exclude regulations which are on file. Such inconveniences in agency material are likely because some of the agencies publish compilations of their regulations only every few years or so, making it necessary to use mixed forms of materials most of the time. Nothing in the new law prohibits the agencies from making their regulations available upon requests but it is a duplicatory step, and usually one which is not adequate in itself.

Miscellaneous Provisions

The most important of the miscellaneous provisions is that which provides that "The Statute Revision Commission shall cause to be prepared, for submission to the 1954 General Assembly, a draft of an Act providing uniform procedures for practice before administrative agencies, and for judicial review of their actions."\(^{61}\) It is generally conceded that extensive legislation in this field should be undertaken only after a study of the general problem in this state, as well as the particular problems of each agency.\(^{62}\) This provision for drafting additional agency legislation recognizes the benefit to be gained from pre-legislation work in this field. This method of approach to the problem also guards against rousing the antagonism of the state agencies, since they can be given the opportunity to participate in the program from the beginning.

The work involved in such a study is a highly variable sort of thing but the statute indicates how extensive this study should be. "In the preparation of such draft the staff of the Commission shall consult with representatives of the various state agencies,


and utilize such information and assistance as may be made available by the Legislative Research Commission." These prescriptions entail examination of the statutory law of this state, the present practices and problems of all the regulatory agencies, and of the case law of this state, all against the background of general developments in regulatory administration. The Act seems to contemplate a rather complete study. This will not be a simple task for as Judge Augustus Hand put it recently, "The subject of administrative procedure is relatively new and acutely contentious."

The Act authorizes the employment of "... qualified personnel to carry out the provisions of this Act;" and makes money appropriated to the now defunct Codification Board "... available to the Statute Revision Commission for the purposes of this Act." All fees paid to the Statute Revision Commission under this Act are to be credited to a trust or agency fund account for the same purpose.

Other sections of this Act provide for the transfer of the files of administrative regulations from the office of the Secretary of State to the office of the Statute Revision Commission for the indexing of these regulations and the creation of a "dead" file for regulations no longer in force; and for the repeal of all of the original filing act.

In Summary

The 1952 state agency law, which is set up in terms of agencies and regulations, deals only with the problems of administrative rule making, and chiefly with the ones having to do with the filing of regulations and the date they take effect, the legal consequences of filing, and the distribution of filed regulations. The major changes this law effects over the original filing Act are the placement of both custodial and distributive functions in the office of the Statute Revision Commission (along with the abolition of the

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64 Hand, Augustus, "Foreword," 33 Iowa L. Rev. 195 (1948).
Kentucky Codification Board); the postponement of the date of effect of regulations for thirty days in the absence of an emergency; and the devisement of a subscription system for making regulations available. The special contribution of this Act to the field of administrative law lies in its flexible subscription scheme of distribution which provides current service on the regulations of the individual agencies. Genuine concern for the future of regulatory administration in the Commonwealth of Kentucky is plain in its plans for future legislation on that matter.

In general, the key provisions—those governing the filing of administrative regulations—constitute the most complete sections of the new state agency law. Most of the ends sought by these provisions are attained. They afford nearly all of the due process protection which is desired in the filing phase of the administrative process. The matter of the date on which regulations take effect could be subjected to some refinement in the future. Admittedly, the administrator must be a better planner to prevent the filing provisions of the statute from becoming an obstruction to his work; but it is equally obvious that the additional protection to the affected public results in increased satisfaction and cooperation on the part of the public which more than compensates for the increased planning burden.

The extent to which the innovation of a subscription scheme of distribution is satisfactory depends greatly on the manner in which the details of this scheme are worked out. The flexibility is there for the establishment of a system of distribution as good as, if not better than, any yet devised. Perhaps the system should be developed toward a full scale loose-leaf system of compiling administrative regulations. The objectives of the Act and the amount of the subscription fee make elaboration of the distribution system quite feasible. The flat-rate of five dollars per agency is the most objectionable part of these provisions. Administration of the distribution provisions should be conducted with a realization that herein is an experiment which may prove of considerable importance to the field of regulatory administration.

The problems connected with judicial notice and the legal presumptions raised by the Act of filing regulations cannot all be anticipated. Actual practice under these provisions and perhaps judicial decision may be necessary before this picture is improved.
Here, as in other problems of administrative rule making, help can be drawn from analogies to administrative regulations' next-of-kin on the paternal side, the statutes of the state. This phase of the administrative process is much like the legislative process.

Serious criticism cannot be made of Kentucky's state agency law because of the cure-all nature of its provisions for study. Its greatest weakness probably lies in the fact that it builds on an assumption that there are regulations to be filed without making a requirement that agencies formalize their activities, at least their procedural activities, to the extent of adopting formal regulations. The resulting non-participation by many of the regulatory authorities seriously limits the achievements of the whole program.

Much of the success of the work undertaken under this law, as well as the future of regulatory administration in Kentucky, rests with the provision calling for the study and preparation of legislation governing all the many phases of the administrative process. The subject under consideration is a growing one. In some states the annual volume of administrative regulations already exceeds the combined annual volume of statutes and judicial opinions. In California a Division of Administrative Procedure has been created to work constantly with the problems of administrative procedure. It is in the light of these developments that the study of Kentucky regulations should be made.

The rest of the success of Kentucky's administrative program depends on the spirit and attitude of the administrator toward his task of regulation—upon his realization that due process of law alone is not enough where a feeling of administrative justice well done is possible. Cooperation on the part of the regulative public makes for better administration in government than uniform or even formalized procedures. The 1952 state agency law provides the basis for building a sound program of administrative justice; it holds a bright prospect for the future of regulatory administration in Kentucky.

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70 Such a requirement is found in sec. 2 (1) of the Model State Administrative Procedure Act.
71 CAL. STAT. (1945), chap. 869. Mr. Benjamin recommends the creation of such an authority in his report. Benjamin, op. cit.