F I S C A L I M P A C T R E P O R T

SPONSOR Boitano **ORIGINAL DATE** 02/12/12 **LAST UPDATED** **HB**

SHORT TITLE Rulemaking Procedures & Impact Statements **SB** 257

ANALYST Hoffmann

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	*	*	*	Recurring	General Fund et al.

(Parenthesis ( ) Indicate Expenditure Decreases)

*It is not possible (without a full survey of agencies) to quantify the fiscal impact of the bill, so costs are indeterminate. Several agencies assert additional costs and operating expenses. See Fiscal Implications below.

Conflicts with HB34.
Conflicts with SB109.
Relates to HB17.
Relates to SB22.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Commission on Public Records (CPR)
Regulation and Licensing Department (RLD)
Energy, Minerals & Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

Senate Bill 257 (SB257) would amend and repeal existing text in the State Rules Act. It would also add 12 new sections to the act and 4 definitions. Some of the new language is taken from the Model State Administrative Procedures Act and is intended to make rule making more consistent throughout NM. Some of the text in the bill is derived from the 2010 Revised Model State Administrative Procedure Act adopted by the Uniform Law Commission. A summary of the bill is as follows.

Section 1 amends the definition section of the State Rules Act. It amends one existing definition and adds five new definitions. Two significant new definitions are "provide to the public," which includes posting on the Sunshine Portal and "regulatory impact statement".

Section 2 would establish a requirement for each agency that issues rules to create an annual regulatory agenda. It lists the required contents of an agenda and mandates that agendas should be updated in a timely manner.

Section 3 would add a requirement to create a preliminary outline for each rulemaking. The stated purpose for the outline is to obtain public input. It would be created prior to formal notice of proposed rulemaking.

Section 4 would add new section to the act, which allows agencies to form rule drafting committees. These committees could contain members from the public and the rule-issuing agencies. The meetings would be open to the public but not subject to the Open Meetings Act or the Per Diem and Mileage Act.

Section 5 would add a new section, which establishing the requirements for and contents of notices of proposed rulemaking.

Section 6 would add a new section that sets out how agencies receive public comment and conduct rule hearings.

Section 7 would add a new section that establishes the requirements for the rulemaking record. This record contains documents related to the rulemaking process and must be posted on the Sunshine Portal.

Section 8 would add a new section that requires a concise explanatory statement to be available at the time an agency adopts a rule. Section 13 (below) would require that this statement be included with the rule when filed at the State Records Center and Archives.

Section 9 would add a new section that explaining how emergency rules are created and filed. Emergency rules are temporary and remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted, the emergency rule only lasts for 180 days.

Section 10 would add a new section that codifies the current practice, under which agencies only do not take action on a rule that varies from the action proposed in the notice of rulemaking, unless that action is a logical outgrowth of the action proposed in the notice.

Section 11 would add a new section that restricts the time period an agency can adopt and file a proposed rule. It establishes a two-year period from the date of publication of the notice of rulemaking in which an agency can adopt the rule. If the rule is not adopted, the rulemaking is considered terminated, unless the agency formally extends the period for another two years. The agency would have to allow additional public participation during the two-year extension. Rules adopted by agencies would have to be filed with the State Records Center and Archives and published in the New Mexico Register within 180

days from date of adoption.

Section 12 would add a new section that requires the Attorney General to adopt default procedural rules that agencies would follow. Agencies would be allowed to adopt their own procedural rules, if desired.

Section 13 would amend Section 14-4-3 NMSA 1978. The requirement for one paper copy and one electronic copy is changed to "copy". The section adds the concise explanatory statement to the material filed with the State Records Center and Archives. The section explains that the State Records Administrator may make non-substantive changes to rules after writing to the filing agency.

Section 14 proposes to amend Section 14-4-5 NMSA 1978 by removing the language regarding emergency rules, which are covered in greater detail in the new material found in Section 9 of the bill.

Section 15 would add a new section that requires the creation and filing of a regulatory impact statement for rules that would cost a business at least $50,000 in time, money or resources.

Section 16 would repeal Section 14-4-5.1 NMSA 1978 which is a temporary provision regarding rules filed prior to July 1, 1995.

The effective date of the bill is July 1, 2012.

FISCAL IMPLICATIONS

Senate Bill 257 makes no appropriation.

The following fiscal impacts are reported by agencies.

The OSE notes that rulemaking is already a lengthy, labor-intensive and expensive process, and SB257 will only make it more so.

The RLD states this bill affects all the boards in RLD significantly. Proposed rules have set review process defined in the Open Meeting Act 10-15-1 through 4, including publication of rules and notice to all interested parties and of public rules hearing and board meeting. The commission just needs to be added to the interested party list to receive notice of all rule hearing and can submit recommendations or comments written or in person at the hearing. The requirements in the Open Meeting Act already require a 30 notice to all interested parties and notification in the NM register. Some boards have upwards of 20,000 licensees, and to mail notices to each licensee would be costly.

The CPR reports that because it would have to maintain the concise explanatory statements that must be filed with rules, it would have to develop both the process and means of filing and retaining those documents. That process would result in continuing costs, although those costs are difficult to determine. CPR also notes that the explanatory statements filed with the records center would be public documents and will require the agency to develop a means of providing ready access. Both physical retrieval and on-line posting would involve additional and perhaps

significant staff time and resources. In FY 11, the agency published 453 rules in the register for 55 agencies; based on these numbers, CPR advises that it will need at least another .25 FTE dedicated to managing these statements. Lastly, CPR reports that existing on-line training on style, formatting and filing requirements would need to be expanded and new instructional materials developed to address the new requirements contained in SB257.

According to the Department of Health (DOH), the bill ensures litigation, particularly concerning the rights of members of the public in an agency's rulemaking process, which will increase costs.

The Human Services Department anticipates a considerable increase in costs to agencies involved in rulemaking in light of the additional posting and mailing involved, as well as increases in the cost of filing rules, along with explanatory statements which are based on the columnar inch.

SIGNIFICANT ISSUES

The AOC explains the potential effect of the proposed legislation as follows.

> This bill would, to a great extent, require state agencies to promulgate rules in the same fashion as federal executive agencies. Many large state agencies that regularly produce rules that have substantial effects on people and different business sectors engage in much of what the bill would require. Affected interests know well in advance that the rules are going to be considered, have ample public opportunity to provide technical and lay evidence, and get a good record of decision from the agencies. Many other agencies use just enough due process to get the rules done in as expeditious and economical manner as possible.
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> With these changes, it should be expected that litigation will ensue coincidental with many rulemakings. In the federal sector, parties use procedural requirements to challenge rulemakings and can get rules that are well crafted after lengthy public input sent back from the courts to the agencies after years of work, only to start again. All affected parties, whether individuals, public interest groups or businesses and business groups, would have a right to expect all agencies to substantially follow all these new provisions. All interest groups could challenge the regulatory impact statement subjective cost/benefit analysis for failure to consider any number of costs or benefits. This is the national experience relative to federal rulemaking, although it is true that most federal regulations are given substantial process but experience little or no constituent interest. It is foreseeable that state rules passed through the process that the bill would require would be similarly subject to infrequent but disruptive (from the agency's perspective) challenges in New Mexico.

The ENMRD provides this summary of the background, purpose and effect of this bill:

> The provisions on regulatory impact statements (RIS) are conflicting. In section 15.A, an agency is required to perform an RIS if information learned during the public comment and hearing process indicates that the rule will cost a business at least $50,000. In the same subsection, the agency is required to announce the availability of the RIS in the public notice which precedes the public comment and hearing. The availability of the RIS in the public notice also conflicts with the definition of RIS in section 1 which

requires that the agency include in the RIS a summary of all comments or evidence submitted during the rulemaking.

The requirements for preparing an RIS will be difficult to achieve. The RIS must contain all probable negative and positive impacts of the proposed rule, the costs and benefits of the proposed rule, the impacts on the general fund and a review of alternatives. Most agencies lack the resources to conduct the thorough analysis contemplated by SB257 particularly within the timeframe of a rulemaking. An RIS may be especially difficult when an agency is simply implementing a change in federal law. SB257 allows the agency to file the rule change with a portion of the RIS and a statement that it lacked the resources or information to complete the RIS. The result may be that many agencies do partial RISs.

The trigger for an RIS seems to be biased towards impacts on large businesses. The trigger is that the rule will cost a business $50,000 in time, money or resources. Thus, a rule which will impact a few large businesses with higher costs (e.g., controls on air emissions from large power plants) will trigger an RIS while a rule that will involve lesser costs (under $50,000 for each business) for many small businesses will not trigger an RIS under SB 257. Yet these costs to small businesses may have a much greater impact to the business than the larger costs to a utility or large business.

The CPR comments the Uniform Licensing Act has rulemaking requirements for licensing boards and could conflict with these amendments. For example, Section 61-1-29 NMSA 1978 requires a board to make reasonable efforts to give notice of rulemaking to licensees and the public, while these amendments require more specific actions; such as posting on the agency website and the Sunshine Portal, providing to the NM LCS and where applicable in languages other than English. Section 61-1-30 NMSA 1978 addressing emergency rules also conflicts with these amendments.

The TRD comments that, while this bill will make rulemaking more transparent, it will also make the process more cumbersome. That agency worries that the extensive requirements established by the bill might subject rulemaking to more court challenges.

The DOH also expresses concern over the amendments proposed in SB257, which it contends would have the following effects.

The bill would impede an executive agency's ability to develop sound public policies, and would add little to the existing framework of rulemaking under the State Rules Act. The bill would require state agencies to publish notice of any rulemaking that they have contemplated, but *before* the actual rule text had even been developed or written, and would further require that executive agencies consider public comments about rules before those rules have even been drafted. It is unclear what benefit would be derived from publicizing and soliciting public comment regarding rules that have not yet been written. It is also unclear what advantage such a process would confer to the rulemaking process under the existing State Rules Act, which already provides the ability of state agencies to incorporate changes to proposed rules based on public input.

SB257 proposes that if an executive agency creates a committee for rule drafting,

> it must comprise that committee of persons who will represent the various interests of members of the public. By requiring that the rule-drafting committee represent the opinions of members of the public, the bill proposes to radically alter the way that executive agency rules are created. It also provides for alternative dispute resolution during the agency rulemaking, presumably with the intention of allowing members of the public who are displeased with the direction of an agency's proposed rule to contest it; but the bill does not explain what the consequence of such dispute resolution would be in terms of the agency's ability to carry forward in promulgating the rule, or what power the arbiter in the ADR process would have with respect to agency rule creation. By vesting ambiguous rights in the public with respect to an agency's proposed rulemaking, the bill virtually guarantees protracted and expensive litigation, particular in those cases where an agency proposes a rule that is controversial.

According to OSE:

> The Office of the State Engineer expresses concern that the repeal of Section 14-4-5.1 NMSA 1978 (*Temporary provision; savings provision*) would mean that many sets of agency rules, possibly in place for decades, would become invalid. The OSE is working with the SRC to determine whether certain regulations pertaining to underground water and administrative hearings on protested and aggrieved water rights applications would remain valid if repealed by this act.
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> For the OSE, two sets of regulations would possibly become invalid: the regulations pertaining to underground water and one set of regulations creating procedures for administrative hearings on protested and aggrieved water transaction applications. These regulations are relied upon to process applications for permits for water right owners and to conduct hearings on protested or aggrieved applications. Repeal of Section 14-4-5.1 would create havoc in administering water rights, at least until new regulations could be enacted. The stay on agency rulemaking by executive order, which will be heard before the Supreme Court on January 26, creates even more uncertainty as to replacing agency procedures that have been invalidated.
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> Finally, there is an excellent possibility that this section of SB257 would generate legal challenges to the invalidation of any rules that were legally promulgated at the time they were put in place. This repeal has the potential of raising many legal issues, including separation of powers claims. There does not appear to be any legal necessity for such a repeal and the problems such a repeal will create mitigates against doing so.

Additionally, OSE advises that since SB257 does not repeal statutes specific to particular agencies' rulemaking authority, notice requirements, or processes for promulgation, the agency-specific statutory provisions would control over the more general provisions of this bill if it is enacted.

The AGO expresses these concerns:

> First, there is some question as to whether this is the proper place to define rule

> making. The current intent of the State Records Act centers around the publication of state rules. Rule making is not a focus of the State Records Act, and has not been since its inception. If the intention is to define rule making more fully, as SB257 attempts to do, it may be that another place in the law is more appropriate. The Administrative Procedures Act ("APA"), 12-8-1 to 12-8-25 NMSA 1978, for instance, already provides a framework for rule making, and may provide better placement for such changes. However, currently the APA is applicable only to certain agencies and if the intention is that all agencies provide rule making in the way that SB257 contemplates, then the APA must be changed to apply to all state entities, or the rule making portions of the APA must be changed to reflect that SB257's mandates apply to all state entities.
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> Further, in terms of the new material itself, SB257 would require that the relatively exacting rule making requirements start again, if the variance between the proposed and final action is great enough that the change is not a "logical outgrowth of the action proposed in the notice." This may make rule making process difficult and/or expensive for state entities.

Finally, the CPR points out conflicts between SB257 and the Uniform Licensing Act (ULA): section 61-1-29 of the ULA requires a board to make reasonable efforts to give notice of rulemaking, while these amendments require more specific actions; and the 180 day duration of emergency rules set in Section 9(D) of the bill is inconsistent with the 120 day limit set in section 61-1-30(A) of the ULA. The CPR also questions the legal implications of the concise explanatory statement that must be filed upon adoption of a rule, such as whether an agency would be limited to the content of the statement in defending rules or amendments on appeal.

PERFORMANCE IMPLICATIONS

Some agencies report no or minimal impact on performance measures. However, the EMNRD expresses concern that the additional time necessary to complete a rulemaking under this bill in rare circumstances could impact compliance with some federally funded programs that require updates in state rules to conform with federal statutory or rule changes. The HSD raises a similar concern.

The CPR notes that one of its key performance measures under the Accountability in Government Act concerns the lag time between the effective date of the rule and its online availability in the administrative code. Additionally, another internal measure relates to online availability of the register by established publication dates. An increased work load could affect that agency's ability to meet these and other performance targets.

The CPR further notes that Subsection B of Section 15 provides that an agency shall file the regulatory impact statement and the rule or proposed rule with the records center. There is a concern with that requirement because agencies only file final adopted rules with the records center; proposed rules are never filed.

Other agencies note the impact of reduced staffing levels in handling the new tasks required in this bill.

ADMINISTRATIVE IMPLICATIONS

The HSD notes that many of the bill's provision would be pre-empted by federal requirements as to Medicaid. Additionally, the HSD would be required to distribute rulemaking information to approximately 50 field offices. This requires additional staff time and resources and, as HSD advises, may further increase and complicate already long wait times for individuals seeking public assistance such as food stamps and Medicaid or child support services in those offices.

NMED is concerned about possible conflicting timelines. Their typical rulemaking timeline (which would generally comply with SB 257 other than the RIS requirement) might include these steps[1]:

(1) Develop discussion draft
→ (2) Public outreach meetings; comments received
→ (3) Change discussion draft (these first three steps may be repeated)
→ (4) Draft published in NM Register for hearing
→ (5) Public hearing; comments received; more rule changes
→ (6) Final version approved
→ (7) File at State Records; publish

SB 257 requires an RIS to be prepared and available at step (4) above, when the proposed rule is published. But an RIS must include a summary of public comments or other evidence submitted during the rulemaking. These items are not complete until after step (5) above.

It is also unclear which of the versions of a rule in the above timeline constitute a "proposed" rule. Read broadly, "proposed rule could include all versions circulated for public input; read narrowly, a rule is only "proposed" when it is published and formal rulemaking begins. But if that narrow interpretation is correct, then no comments exist at step (4) to be included as a required element of an RIS because formal commenting doesn't begin until the rule is "proposed" by publication.

CONFLICT, RELATIONSHIP

House Bill 34 has the same content as Senate Bill 257 but without the requirement for a "regulatory impact" process.

The HSD advises that HB17 requires legislative approval prior to that agency submitting for federal approval amendments to the state Medicaid plan, waivers of state Medicaid plan requirements, and revisions to existing waivers of state Medicaid plan requirements. The HSD expresses concern that SB257 requires HSD to submit these matters to the public prior to seeking legislative approval, which would add two additional procedures to the rulemaking process as to state Medicaid matters.

Senate Bill 22 would require the RLD to establish a program, classified by type of industry, to

[1] Simple adoption of federal rules might be simpler because rule development is already completed and the agency may have no discretion to adopt something different if it wants to keep federal funding.

estimate the cost to businesses of complying with state law and rules that impact the ability of a business to operate in the state.

Senate Bill 109 could conflict with SB257 by making the Small Business Regulatory Relief Commission responsible for duplicating some of the functions in SB257.

TECHNICAL ISSUES

The NMED presented the following technical concerns about definitions in the bill as drafted.

Definition of Person

The term "person" is important to the application of the State Rules Act. For example, this term is integral to the definition of a rule, e.g., it is something which affects "persons." *See*, NMSA 1978, § 14-4-2(C); *and* SB 257 § 1 (amending the definition of "rule"). In SB 257, "persons" are given an opportunity to comment on a rule and "persons" may participate in hearings. *See*, SB 257, §§ 5 and 6. Certain types of "notice" are due to "persons" who participated in a hearing. *See*, SB 257, § 11.

Yet, the definition of "persons" in the existing State Rules Act and in SB 257 does not include political subdivisions, their officers or governing bodies. It is unclear why political subdivisions were originally omitted.

NMED rules can affect political subdivisions. *See, e.g.*, the Environmental Improvement Act, NMSA 1978, § 74-1-3(D) (defining "person" to include political subdivisions, their officers and governing bodies); § 5 (empowering the Environmental Improvement Board ("EIB") to promulgate rules which apply to "persons" outside of the Department); *and* § 10 (allowing compliance orders to be issued against "persons" who have violated an EIB rule). Thus, rules do affect political subdivisions and the definition of "person" in the State Rules Act should be expanded to include them.

Definition of Business

As a general rule, NMED rules do not apply to "businesses" as a distinct regulatory class. Instead, an activity becomes regulated if certain requirements are met. To illustrate, drinking water regulations apply if an owner or operator of a water system serves water to at least fifteen connections or to at least twenty-five persons. Thus, the class regulated may include typical businesses (e.g., a restaurant or a utility in the business of providing water) but it may also include government entities such as schools and cities or non-profit organizations such as churches or summer camps. Whether a rule will cost $50,000 for compliance can be heavily influenced by the composition of the class of regulated entities which in turn depends on how the term "business" is defined. It would be helpful to provide a definition for clarity.

The CPR observes in the first sentence of Section 15, Paragraph A the word "perform" should be changed to "prepare." Or the sentence should require an agency to "…perform an analysis and prepare an impact statement…"

CH/lj