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

SPONSOR Ivey-Soto **ORIGINAL DATE** 02/05/15 **LAST UPDATED** 02/24/15 **HB**

SHORT TITLE Requirements for Proposing & Changing Rules **SB** 194/aSRC/aSJC

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	$25.0	$25.0-$50.0	Recurring	Records Center Fund

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		>$120.0	>$120.0	>$240.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From

Energy, Minerals & Natural Resources Department (EMNRD)
State Commission of Public Records (CPR)
Attorney General's Office (AGO)
Department of Health (DOH)
New Mexico Department of Transportation (NMDOT)
Department of Finance & Administration (DFA)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 194 makes these changes:

- Adds an additional method by which an agency must distribute rulemaking information to the public: by postcard notice with internet and street address where that information can be found to persons who have provided postal addresses;

- Deletes Section 4, which allowed an agency to appoint a rule drafting committee;
- Clarifies that there will be a public hearing on a notice of proposed rulemaking;
- Eliminates an unanticipated loss of funding for an agency program as a basis for an emergency rule; and
- Adds a prohibition against readoption of an emergency rule as an emergency rule upon its expiration, even if no permanent rule has been adopted.

One responding agency notes that the original bill had relied largely on internet and email to notify the public of rulemaking, pointing out that many people in New Mexico do not communicate through the internet and would not have received direct notice of a rulemaking proceeding even if they had requested it. That problem now has been addressed by the new postcard notice requirement. A second agency calls attention to the removal of an unanticipated loss of funding as a basis for an emergency rule, noting that SB 194 now prevents the adoption of a short-term rule (until the more formal promulgation of a more permanent rule) to avoid loss of those monies.

Synopsis of SRC Amendment

The Senate Rules Committee amendment to Senate Bill 194 replaces the term "records center" with "state records administrator" or "state records administrator or the state records administrator's designee" throughout to more properly reflect that rules must be filed with the persons specified, rather than with the physical location. It also expands the time period for filing an adopted rule with the state records administrator or the administrator's designee from five to fifteen days, and removes the provision repealing the savings clause for rules that were legally promulgated before July 1, 1995, thus reinstating that savings clause.

Synopsis of Original Bill

Senate Bill 194 provides a detailed, uniform process for state agencies to process and adopt rules. It amends these provisions and adds new sections of the State Rules Act Sections 14-4-1-11, NMSA 1978:

- Section 14-4-3 revises the requirements for submitting a rule to the Records Center and allowing the Records Center to make minor, non-substantive corrections to the rule (Section 2);
- Section 14-4-5 provides limits on when an agency may file a rule (after the public notice period) and for a termination of the rulemaking if no action is taken within 2 years after notice is published (Section 3);
- A new section allows agencies to use a rule drafting committee to provide comments and possibly reach consensus on a proposed rule (Section 4);
- A new section requires a proposed rule be noticed for public comment not later than 30 days before a rule hearing and sets forth the required content of the notice. The notice must be provided in six different means listed in a new definition of "provide to the public" in Section 1 (Section 5);
- A new section sets the minimum requirements for public participation and comments during the rulemaking, including a public hearing (Section 6);
- A new section requires the agency to maintain a rulemaking record, which includes technical information relied upon by the agency, all public comments on the rule and

the transcript of the public hearing, which must be available through the sunshine portal (Section 7);

- A new section requires the agency to provide a concise explanatory statement giving the agency's reasons for adopting the proposed rule, as well as the agency's reasons for not accepting substantial arguments made in testimony and comments (Section 8);
- A new section allows for emergency rules only if following the usual rulemaking procedures would: (1) cause an imminent peril to the public health, safety or welfare, (2) cause unanticipated loss of funding for an agency program, or (3) place the agency in violation of federal law. Certain procedures must still be followed, and an emergency rule lasts until the earlier of a permanent rule being enacted or 180 days (Section 9);
- A new section provides that no rule is valid if it conflicts with a statute, and that a term defined in a statute cannot be defined in a rule, and any conflict between two definitions is resolved in favor of the statute (Section 10);
- A new section requires the Attorney General, by January 1, 2016, adopt default procedural rules for public hearings when an agency has not adopted its own procedural rules (Section 11); and
- A new section allows the state records administrator to ask an agency to review a rule that the administrator finds is in conflict with the statute. The agency has 30 days to conduct the review (Section 12).

SB 194 also repeals a savings clause for rules adopted before 1995 (Section 14).
The effective date of SB 194 is July 1, 2015.

FISCAL IMPLICATIONS

CPR reports that under SB 194, the state records administrator is assigned additional responsibilities that would require additional staff with legal background. The administrator is responsible for: interpretation and sufficiency of compliance by agencies with requirements for concise explanatory statement, emergency rule filings and rule review to determine conflict between statute and an adopted rule. It estimates those additional responsibilities will require at least one legal counsel position and at least one paralegal position. The estimated budget impact for this additional staff is set forth in the table above.

Further, CPR expects an increase in filing and publications given: the additional requirements for filing, the increase in content of filings, the compressed time (5 days) for filing of adopted rules by agency, and the additional materials to be posted on agency website. The income generated by these new requirements is estimated at $25 thousand to $50 thousand per year, as shown in the revenue table above.

EMNRD reports that the additional procedures required for it, and its Commissions, to propose and adopt a rule change are not substantial enough to have an operating budget impact. NMDOT notes additional costs will be incurred related to rulemaking under the provisions of this bill, but estimates the overall budgetary impact as minimal. Although DOH states that the bill could place significant financial burdens on state agencies, including costs related to litigation that may arise from controversial rulemaking under SB 194's new procedures, it does not estimate or otherwise quantify any anticipated budgetary impact. Similarly, DFA reports there may be additional costs incurred in the rulemaking process due to the additional requirements, along with insufficient agency resources to ensure all requirements are met.

SIGNIFICANT ISSUES

EMNRD advises that SB 194 provides a uniform process for the consideration of rule changes across state government while increasing the opportunities for the public to participate in the rulemaking process and providing limitations on rules that may conflict with statutes. Currently, each agency has its own process for adopting rules, which may be outlined in a statute or in an agency rule or policy. In some cases, agencies have no guidance for the adoption of rules which may be required by existing statutes.

SB 194 establishes a process that applies to all state agencies and expands opportunities for public notice and input. EMNRD points to the current lack of a requirement that every agency hold a public hearing before adopting a rule; SB 194 requires a hearing. There is also no standard for public notice and EMNRD reports the NM Supreme Court has issued conflicting decisions about what level of notice is required for a rulemaking. Compare Livingston v. Ewing, 1982-NMSC-110, ¶14 ("There is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory only.") with Rayellen Resources, Inc. v. N.M. Cultural Properties Review Comm., 2014-NMSC-006, ¶ 52 (Due process may apply to rulemakings but "[g]eneral notice of the issues to be presented at a hearing is sufficient to comport with due process requirements."). SB 194 provides significant detail on the timing, content and recipients of public notice.

According to EMNRD, the public will benefit from having a single process to follow for any agency's rulemaking process. The detailed notice provisions likely will make more people aware of rulemaking proceedings that affect their interests.

On the other hand, AGO points out that numerous state agencies, commissions and boards already have rule-making provisions provided for in their governing statutes. For example, the Uniform Licensing Act sets forth procedures that professional boards and commissions must follow. Under Section 61-1-30(A) of the ULA, emergency rules remain in effect for no more than 120 days; this is inconsistent with Section 9 of the bill, which would allow the emergency rule to remain in place 180 days after the effective date. As currently drafted, it is unclear whether SB 194's mandates would trump the current rule-making provisions contained in conflicting statutes. Similar issues arise as to any agencies that are subject to the Administrative Procedures Act. See Sections 12-8-1 through 25, NMSA 1978.

In that same vein, DFA points out that the existing statutes which describe the administrative rulemaking process to be followed by the Taxation and Revenue Department (Section 9-11-6.2 NMSA 1978), and the administrative rulemaking process to be followed by the State Engineer (Section 72-2-8, NMSA 1978), also may need to be amended to the extent that these statutes conflict with the procedures required in the bill. For example, Section 72-2-8(D) allows the State Engineer to hold a hearing on a proposed regulation "not more than thirty days nor less than twenty days after the last publication" of the proposed rule. This 20 day provision conflicts with the provision of this bill that requires at least a 30-day public comment period after publication of the proposed rule.

Additionally, DFA warns that some agencies may curtail rulemaking due to the additional requirements, relying more on administrative authority for statutory interpretation. This may, in turn, impact uniform implementation and interpretation of a governing statute when long term employees with historical background regarding statutory interpretation and administrative

implementation leave an agency, and newer employees need a uniform interpretation to proceed with an agency's work. Lack of uniformity or consistency in administratively implementing a statute due to turnover may lead to more administrative or court hearings or procedures relative to administrative implementation.

AGO also advises that Section 14's repeal of existing Section 14-4-5.1 would have significant consequences because it may effectively invalidate all the rules that were filed prior to 1995 that have not been repealed, amended or superseded. There is a strong possibility that this section of SB 194 would generate legal challenges since it seeks to invalidate rules that were legally promulgated at the time they were put in place.
Additionally, AGO questions whether the "reasonable fee" that an agency may charge pursuant to Section 5(B) for providing rule-making records in non-electronic form is the same as that authorized in Section 14-2-9 of the Inspection of Public Records Act. It also notes the Section 5 (D) requires an agency provide notice to the public of any change in the rule hearing date, but does not specify how many days in advance the notice should be given. Additionally, AGO comments that pursuant to Section 4, although meetings of an agency's rules drafting committee are to be open to the public, they are not subject to the Open Meetings Act, and questions how the public would learn of those meetings, and what standard would be used to determine adequate notice.

As to the particulars of SB 194, the CPR comments:

- Section 1's deletion of "statement of policy" in definition of "rule" may create a loophole;
- Section 3(B) allows for publication of termination of a rule-making proceeding at any time, the practical effect of which may result in publication after the proposed hearing date;
- Section 3(D) provides that a rule must be filed with the administrator within five days of adoption, which time period may be too compressed to ensure that rules conform to all style and formatting requirements. DOH also expresses concern with this short period of time, given the scope and extent of formatting requirements for publication of rules and the specific filing and publication deadlines applicable to rule-making;
- Section 10 prevents deviation from a proposed rule unless the resulting rule is a logical outgrowth of the proposed rule and the agency provides a detailed justification in its rulemaking record. The absence of definitions or standards of review for either of these terms may be problematic; and
- Section 12 authorizes the administrator to request agency review of a rule the administrator finds to conflict with statute and requires that agency review occur within 30 days of the request, but provides no mechanism for resolving conflicts between the administrator and the agency following that review.

DOH comments that the bill would hamper agencies' ability to freely develop and promulgate regulations. If an agency creates a committee to draft rules, it would be required under this bill to incorporate the views of private individuals. The bill would also make state agencies (rather than state Records & Archives center) the official repositories for records concerning rulemakings, requiring agencies to acquire additional storage, etc. It discusses a number of specific issues it foresees in implementing the changes to rule-making required in SB 194:

The bill would require that an agency create various explanatory statements before adopting a proposed rule. Agencies would be required to explain why they have chosen to adopted a rule; why they did "not accept...substantial arguments" (an expression undefined in the bill) made by members of the public; and what "technical information" (also not defined) the agency relied upon in drafting a rule. Agencies would also be required to provide a "justification" of "the reasons for any substantive change between the text of the notice of proposed rulemaking and the text of the rule as adopted". The agency would be prohibited from adopting a rule unless and until these various "explanations" were created and included with the filing to the State Records Center. Such a process would not only represent a departure from the current framework for rulemaking, but would be burdensome for state agencies, particularly in the case of lengthy and controversial rules that receive a large amount of feedback from the public. Given the ambiguity of what may reasonably suffice as an "explanation" or "justification" for purposes of this bill, it can also be anticipated that such requirements would create additional bases for litigation by individuals who oppose an agency's rulemaking. Those litigants would likely argue that a given "explanation" was not sufficiently "explanatory", or that a "justification" of changes made after a hearing was not sufficient.

The bill would also vest in the State Records and Archives Center the ability to challenge agency rules that Records and Archives believes are in conflict with statute. In this way, the bill would impose upon Records and Archives a new "policing" role that does not exist currently in statute.

The bill would require that an agency make the entire record of every rulemaking available via the state "Sunshine Portal" website. It is unclear whether the Sunshine Portal has the storage capacity to handle such a large volume of information, as the volume of materials involved in an agency rulemaking can in some cases range into thousands of pages. The scanning of such volumes of material would impose significant additional administrative burdens on agency staff. The rulemaking record provisions would also deviate substantially from existing laws, insofar as it would require that agencies maintain the entire rulemaking record within their own files, whereas existing law designates the Records and Archives Center as the repository for the record of all rulemakings.

The bill would prohibit an agency from defining in its rule a word or phrase that is defined in statute. However, statutory definitions are often expanded in agency rules in ways that use varying or additional terminology, but that are nevertheless consistent with statute. The fact that a statutory definition is expanded upon in rule would not (as this bill suggests) necessarily demonstrate an inconsistency between the statute and the rule, as agencies are often required to expound on a statutory framework in order to create functional rules. If there appears to be an inconsistency between definitions provided in rule and in statute, the focus should be (as is currently the case) whether the rule definition is actually inconsistent with the statute, not whether there is a technical difference between the definitions given.

PERFORMANCE IMPLICATIONS

NMDOT reports no major performance implications. NMDOT currently complies with rulemaking processes already set forth in the New Mexico Administrative Code and its own internal policies and procedures. It notes, however, that SB 194 includes some substantive deviations from current processes that, given limitations in staffing, could impact the time needed to complete the rulemaking process, as well as to set aside resources and time to ensure compliance with SB 194's expanded notice procedures.

OTHER SUBSTANTIVE ISSUES

EMNRD reports that SB 194 evolved from the work of a Task Force that was formed in 2010 to investigate the feasibility of adopting uniform administrative laws, including those within the revised Model State Administrative Procedures Act. The Task Force drafted a uniform rulemaking bill which was introduced in previous sessions. SB 194 evolved from that effort and incorporates amendments proposed at prior sessions and deleted some sections from the original bill. The Task Force, which was comprised of industry representatives, community group representatives and state agencies and academics, reached consensus on the proposal and presented its results to Legislative interim committees.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to follow a variety of existing procedures for the promulgation of regulations as provided either by statutes, rules or agency policies

AMENDMENTS

EMNRD calls attention to Section 10(B), prohibiting an agency from defining a word in a rule that is already defined in a statute, and then addresses conflicts between definitions in rules and statutes. In EMNRD's experience, some rules do repeat definitions from statutes so that the public and regulated community can see all the relevant definitions in one place. It suggests that the first sentence of 10(B) might be more clear and allow the repetition of statutory definitions in rules for the convenience of the rule's readers if it read: "A word or phrase that is defined in an applicable statute should not be defined differently in rule."

CPR recommends these amendments:

1. Replace "records center" or "state records center" throughout bill with "state records administrator" as it is the position not the physical location that is charged with accepting filing.

2. Add new definition in Section 1 at page 3, line 22, "H.'state records administrator' means the administrator of the state records center, as appointed by the Commission of Public Records." This definition makes clear the distinction between position and the physical location.

3. Expand the time period in Section 3 at page 5, line 21 from five to fifteen days to allow a reasonable time for agency filing with the state records administrator.

MD/bb/je