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

SPONSOR HSIVC **ORIGINAL DATE** 02/14 /17 **LAST UPDATED** 03/13/17 **HB** 58/HSIVCS/aHJC/ aSJC/aSFl#1

SHORT TITLE Rule Making Requirements **SB**

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	**FY18**	**FY19**		
	$25.0	$25.0	Recurring	Records Center Fund

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		>$65.3	>$65.3	>$130.6	Recurring	Various

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Office of the Attorney General (OAG)
Commission of Public Records (CPR)
Department of Finance & Administration (DFA)
Department of Health (DOH)
Energy, Minerals & Natural Resources Department (EMNRD)
Human Services Department (HSD)
New Mexico Department of Transportation (NMDOT)
New Mexico Environment Department (NMED)
Public Education Department (PED)
Public Regulation Commission (PRC)
Regulation & Licensing Department (RLD)

SUMMARY

Synopsis of SFl#1 Amendments

The Senate Floor Amendments #1 to the House Government, Indian and Veterans Affairs Committee Substitute for House Bill 58, as amended, reinstate Section 9 as far as the prohibition against a rule conflicting with a statute and barring the definition in the rule of a word defined in an applicable statute, but strike Subsection C, which imposed the "logical outgrowth" and "detailed justification" standards.

The deletion of Subsection C in Section 9 avoids difficulties that agencies predicted would arise in application of the standards set out in that subsection, and allows provisions of the final rule to reflect changes that may result from the rulemaking process, including hearings and public comment.

Synopsis of SJC Amendments

The Senate Judiciary Committee amendments to the House Government, Indian and Veterans Affairs Committee Substitute for House Bill 58 as amended 1) clarify that a proposed rule must be authorized by specific legal authority; and 2) clarify the public notice that must be given within 15 days of adopting a final rule by use of the phrase "provide to the public", which phrase is defined in CS/HB 58 to require seven different methods of public notice. The amendments also strike Section 9 in its entirety, including the bar against defining a term already defined in statute, and the "logical outgrowth" and "detailed justification" standards that were to be applied to any differences between a proposed rule and its final version.

The deletion of Section 9 avoids difficulties that agencies predicted would arise in application of the standards set out in that section, and allows provisions of the final rule to reflect changes that may result from the rulemaking process, including hearings and public comment.

Synopsis of HJC Amendments

The House Judiciary Committee amendments to the House State Government, Indian and Veterans Affairs Committee Substitute for House Bill 58 strike the section declaring all rules automatically expire in 12 years, along with those specifying readoption, procedural and reporting requirements relating to such expirations.

It also makes these clarifying changes:

- In the definition of "provide to the public", replaces the requirement for postcard notice with the more general phrase "written notice";
- Clarifies the definition of "rule" to 1) exclude orders (but adds language to cover rules that implement or interpret legal mandates or law), 2) include renewals, and 3) expressly include persons served by an agency affected by agency action as a basis for requiring a rule;
- Requires an agency to give public notice in the same manner as required for rulemaking generally of minor, nonsubstantive corrections in spelling, grammar and format made by the state records administrator upon the filing of a rule;
- Directs the agency in the public hearing on a proposed rule to determine how parties to

the proceedings and the public may participate, consistent with governing law and in a fair and equitable manner; and

- Allows an agency to adopt or continue in effect its own procedural rules as long as they provide at least the same ability of parties and the public to participate in public hearings as provided in the OAG's default procedural rules.

Amendment 6, which requires that notice to the public of minor, nonsubstantive corrections in spelling, grammar and format made by the state records administrator upon an agency's filing of a final rule must be given in the same manner as the initial rulemaking, including providing notice in the seven different ways set out in Section 1(E) and publishing those corrections in the register, may increase an agency's workload and costs without providing much if any benefit to the public.

The revenue and operating budget impact tables above have been adjusted to show less revenue and reduced costs based on these amendments.

Synopsis of Original Bill

The House State Government, Indian and Veterans Affairs Committee Substitute for House Bill 58 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), requires the state records administrator (SRA) to publish the rule within 90 days, and also provides for termination of the rulemaking if no action is taken within two years after notice is published (Section 3);
- 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 the seven different ways listed in a new definition of "provide to the public" included in Section 1. SRA must publish that notice in the next publication of the New Mexico register (Section 4);
- A new section sets the minimum requirements for public participation and comments during the rulemaking, including a public hearing (Section 5);
- 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. That record must be available through the sunshine portal (Section 6);
- A new section requires a rulemaking agency upon adoption of a rule provide a concise explanatory statement containing the date of adoption, reference to the specific authority authorizing the rule, and any findings required by law (Section 7);
- 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 an unanticipated loss of funding; 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. An emergency rule cannot be readopted as an emergency rule (Section 8);

- A new section provides that no rule is valid if it conflicts with a statute, 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 statutory definition (Section 9);
- A new section requires the Attorney General, by January 1, 2018, adopt default procedural rules for public hearings when an agency has not adopted its own procedural rules (Section 10);
- Two new sections provide for the automatic expiration of any rule twelve years after its adoption. For existing rules, the SRA will establish an expiration schedule for each agency's rules with an ultimate expiration date of June 30, 2030. (Sections 11 and 12); and
- A new section requires the SRA to report annually to the Governor and Legislative Council Service that includes an expiration schedule and a listing of rules reviewed that year. (Section 13).

The effective date of this bill is July 1, 2017.

FISCAL IMPLICATIONS

Operating Budget Impact

Many agencies comment that they may or will incur additional costs related to the new rulemaking requirements in CS/HB 58, including costs to distribute rulemaking information and increases in publications. PED provided this breakdown of projected increase in costs in its analysis of the original bill, which are still relevant to this substitute:

> If the Public Education Department engaged in 10 rule changes in a year, the cost would accumulate to nearly $20,000 annually. These costs are itemized below:
>
> Explanatory Statements: $6.00 for two columnar inches per notice X 10 = $60.00;
> Postcard Notice: 4,000 people provide postal address X $.465 X 10 = $18,600

PRC reports an average of six rulemakings a year, at an average cost of $2,479 per rule, for a total annual cost of $14,874. Based on the automatic expiration provision of the bill, PRC anticipates an additional 12 rulemakings annually (based on 126 regulations that are intended to be permanent), resulting in annual costs for 18 rulemakings of $44,622.

DOH estimates that, given approximately 100 existing rules, the cost of a 12-year renewal cycle, assuming a $7,000 cost per rule, its annual cost would be approximately $58,000 per year for hearing officer fees plus another $5,500 annually for publication and notice fees, for a total annual cost of $63.5 thousand.

NMED predicts significant expenditures within the first five years of enactment to revise existing rules and seek legislative changes to existing statutes as necessary, along with retraining staff on new requirements. Additionally, the expanded public notice requirements, which include mailings in addition to electronic notification and potentially lengthier publications in the New Mexico Register, will add to costs. NMED also estimates the automatic 12-year expiration will result in further significant expenditures. DFA reports there may be additional administrative costs associated with the increased burden for notice and rulemaking transparency (posting, mailers and deadlines) buttressed by general labor costs supporting those burdens.

In addition, CPR reports that the state records administrator or designee assumes additional responsibilities under CS/HB 58 that may require additional staff with legal background. The administrator/designee would be responsible for interpretation, determinations regarding sufficiency of compliance by agencies with requirements for concise explanatory statement, and emergency rule filings. CPR estimates those additional responsibilities may require one paralegal position; its estimated budget impact is $43.5 thousand annually.

In the absence of more definitive estimates from some agencies, the figure appearing in the operating budget impact table above is the total of the specific amounts from those agencies who provided them, as described in this section, accompanied by the ">" sign, representing unquantified costs reported by other rulemaking agencies.

Revenue

CPR also expects an increase in filing and publications given the additional requirements for each in the bill, as well as the increase in content of filings and the additional materials to be posted on the agency website, along with filings for new promulgations due to the automatic 12 year expiration provision. CPR estimates the income generated by these new requirements at $30 thousand per year, as shown in the revenue table above.

SIGNIFICANT ISSUES

CS/HB 58 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. Currently, however, almost all agencies have their own processes for adopting rules, which may be outlined in a statute or in an agency rule or policy. There may be some cases, however, where an agency has no guidance for the adoption of rules which may be required by existing statutes. DFA comments that this bill tries to balance restrictive enforcement measures against agencies' limited administrative capabilities. NMED advises it supports rulemaking standardization to avoid confusion and delay due to variations among state agencies' rulemaking processes, as well as public notice requirements. It also supports electronic filing, particularly since its rules can be in excess of 50 pages, which reduces costs and administrative burden, while raising issues as to specific provisions as noted in this analysis.

Automatic Expiration

The automatic expiration of every rule after 12 years in Section 11 is perhaps the most significant change in agency rulemaking for the state, and many agencies take issue with it, both as to cost and the administrative burden it imposes. DFA believes it is unnecessary, and sees little need for a readoption process when existing rules are currently revised as necessary. NMDOT notes it has 40 rules that it actively implements, and tracking and readopting them to ensure they do not expire requires it to divert limited resources. NMDOT warns that expiration of a rule could impact federal funding and the public at large. DOH expresses similar concerns, posing public health and safety risks if for whatever reason a rule terminates without its replacement being readopted in a timely fashion. NMED notes setting a firm expiration date for rules such as Air Quality Control regulations may jeopardize federal action, such as approval of the State Implementation Plan. Further, NMED questions what testimony and evidence will be required to readopt, which could result in voluminous expert testimony to rejustify each provision of a sound and valid rule.

ENMRD also raises that, and another related issue:

> This is an entirely new concept for New Mexico and leaves many questions unanswered. For example, there is no standard for the "readoption" of a rule. Must an agency justify every part of such existing rule, or merely state that the rule is still necessary or required by statute? There is also no definition of a "rule". The New Mexico Administrative Code does not use the term "rule" and instead is subdivided into "Titles", "Chapters", "Parts" and "Sections". For instance, EMNRD has adopted the rules to administer the Oil and Gas Act under Title 10, Chapter 15 of the NMAC. Within that Chapter, there are over 30 "Parts". Must the agency readopt "rules" at the Chapter or Part level?

Existing Statutory Rulemaking Provisions

OAG in its analysis of an earlier version of this bill pointed 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 licensing 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 8 of the bill, which would allow the emergency rule to remain in place 180 days after the effective date.

Similarly, PRC points to a number of conflicts between its rulemaking statutes and rules and the procedures, time limits, publication requirements, and other provisions of CS/HB 58, including how rulemaking notices are provided to the public, the public comment period of 30 days (PRC's statute requires 20 days), the emergency rulemaking provisions, a rule's effective date (by PRC statute, 15 days after filing versus this bill's designation of the publication date), and the two-year termination of rulemaking (versus 18 months in PRC's statute).

As currently drafted, NMED and other agencies note it is unclear whether CS/HB 58'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. Additionally, many agencies that already have rulemaking regulations in place will need to review them to be consistent with the requirements of the bill before January 1, 2018.

Other Provisions of the Bill

Section 1: RLD notes that the requirement to send postcard notices for distribution of rulemaking information is not limited to those persons who have made a written request for notices concerning rulemaking. See Section 1 (E)(6). RLD records contain postal addresses of a large number of licensees regulated by numerous boards, commissions and councils under its purview, but who may not have requested receipt of rulemaking information. A limitation such as that found in Subsection (E)(4) of that same section may help clarify the duty to send postcards.

In its analysis of the original bill applicable to this substitute, PRC asserted that some of the bill's provisions may not be appropriate for all agencies, particularly those that are responsible for rulemaking in diverse areas of responsibilities. As one example, PRC cited the requirement in Section 1(E)(3) that rulemaking information be provided in any district, field and regional office

of the agency, and questions whether that means the State Fire Marshal's offices must make available information regarding utilities and telecommunications rulemakings. HSD also comments on this requirement, noting that some offices may not be open to the public or may not be able to provide that information upon request, leading to a significant administrative burden without necessarily providing any benefit to the rulemaking process. However, HSD does suggest that these requirements may be more appropriate when the rule will have an impact on members of the public at large, such as benefit changes under Medicaid.

Section 3: NMED expresses concern that the two-year limitation on rulemaking in Section 3 is an arbitrary deadline that may impact its processes, given the technical nature of its programs which require a great deal of scientific and technical data and testimony, which may lead to deliberations and negotiations that require intensive research and debate. It notes that some of its rulemakings may require litigation to resolve interrelated issues before a rule can be finalized and officially adopted.

Section 4: PRC asserts that because many industries that are subject to the jurisdiction of the PRC, including electric, gas, and some water utilities, are replete with state and federal statutes and regulation, as well as controlled by voluminous scientific and engineering technical standards and professional rules, Section 4(A)(7)'s requirement that citations to technical information be included in the notice of rulemaking will be a burdensome task.

Section 6: DOH's earlier analysis raises issues that remain in this substitute:

> The bill would require state agencies to act as the records custodian of all their rulemaking records, and to maintain those documents in-house. Currently, agencies submit rulemaking records to NM Records and Archives for archiving. This change in practice would result in added costs for agencies for additional storage space.
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> The bill would also require that rulemaking records be "readily available" for inspection in the central office of the agency. Thus, agencies would be prohibited from storing voluminous rulemaking records in locations other than their central office. By use of the expression "readily available," it is unclear whether the bill would impose more stringent inspection requirements than those applicable under the State Inspection of Public Records Act (IPRA), NMSA 1978, §14-2-1 *et seq*.

Section 7: DFA comments that Section 7, which details the new requirement for a concise explanatory statement following adoption of a rule, could provide a solution to public confusion regarding the rulemaking process. However, while this section provides a measure of accountability by requiring the creation of a record in which the promulgating agency expresses the nature of the rule, DFA warns that this obligation could result in a great administrative burden with the potential to hamper the expediency of the rulemaking process. As to this provision, EMNRD advises the elements to be included in that concise explanatory statement conflicts with longstanding case law, which requires an agency provide its reasons for adopting the rule. The courts have long held that an agency must provide its "reasoning and basis for adopting regulations". *Tenneco Oil v. NM Water Quality Control Comm'n*, 107 N.M. 469, 474 (Ct. App. 1987) (citing *Roswell v. NM WQCC*, 84 N.M.461 (Ct. App. 1972); *Bokum Resources Corp. v. NM WQCC*, 93 N.M. 546 (1979)).

Section 8: Additionally, DFA expresses concern that Section 8, which provides for emergency rules that may remain in place for up to180 days, allows agencies to bypass the normal processes necessary in rulemaking, exposing the process to potential misuse. It recommends a shorter temporary period, or some contemporaneous emergency rule review by an oversight agency, to avoid such misuse.

HSD also expresses concern about these emergency rulemaking provisions, particularly the language that such a rule takes effect immediately. It explains that federal regulators such as Centers for Medicare and Medicaid Services (CMS) often issue directives a few days after they are effective, requiring HSD to adopt emergency rules that may be retroactive. This bill may not permit that necessary action. PRC expresses the concern that the new and undefined "imminent peril" standard for emergency rules, as opposed to the existing "preservation of public peace, health, safety or general welfare" standard will result in unnecessary confusion.
Section 9: Section 9(C)'s requirements regarding variances between a proposed rule and its final version provoke multiple comments from agencies. For example, PED's earlier analysis first takes issue with its use of:

> The vague phrase "logical outgrowth of the action proposed in the notice" to define when a final rule may contain material that differs from the action proposed in the notice of proposed rulemaking. If the different material is a "logical outgrowth of the action proposed in the notice" and a detailed justification is included in the rulemaking record, it will be allowed. This standard could be difficult to apply.

In its earlier analysis, DOH asserted a similar concern as to that "detailed justification" requirement:

> The bill also requires that agencies include a "detailed justification" for any action taken in a final rule that "differs" from the action proposed in the notice of rulemaking. It is unclear what standard would be applied in determining whether an alternative action was sufficiently "justified" for an agency to take it. The ambiguity of this expression would likely result in costly litigation for state agencies.

In addition, HSD notes that Section 9(B)'s limitation that prevents defining a term in a rule that is defined in a statute may create difficulties in addressing situations where state and federal requirements are written years after the governing statute is enacted.

PERFORMANCE IMPLICATIONS

The requirement for readoption of rules at least every 12 years may place a significant burden on the agencies. EMNRD notes it has thousands of pages of rules spread across numerous Titles and Chapters of the NMAC, and that agencies will need to carefully schedule readoption proceedings to minimize administrative burdens. PRC also reports that requirement will place a large strain on its employees.

CPR advises that although Section 3(D) of the bill sets an outer limit of 90 days in which it must publish an adopted rule, it typically publishes rules and posts them on the New Mexico Administrative Code website within 32 days.

NMDOT notes it currently complies with rulemaking processes already set forth in the New Mexico Administrative Code and its own internal policies and procedures. It points out, however, that CS/HB 58 includes some substantive deviations from current processes that could impact the time needed to complete the rulemaking process. HSD raises similar performance implications.

ADMINISTRATIVE IMPLICATIONS

CPR comments that given new rule-making requirements and processes, agencies will need training on the changes. NMED notes the provisions of Section 6 requiring a rulemaking agency maintain the rulemaking record at its central office. Rulemakings before the department, the environmental improvement board and the water quality control commission produce voluminous records that, if not transferrable to state archives, will quickly require additional records storage.

TECHNICAL ISSUES

Many agencies express confusion over the terms "adopted" and "filed" . Definitions of these terms may eliminate those issues. For example, the new subsection 3(E) declares a rule cannot take effect unless it is "adopted and filed" within the time limits set in Section 3, which appears to be inconsistent with subsection 3(D)'s mandate (unchanged from existing law) that unless a later date is otherwise provided by law or in the rule, the effective date shall be the date of publication in the register. Adding the phrase "and published" following "filed" in line 19 might eliminate the apparent inconsistency between the two subsections. Similarly, Section 11 mandates that all rules expire no more than 12 years after "adoption". Further, under Section 3(D), a rule may have a delayed effective date as provided by law or by the rule itself. Since publication in the register is the typical trigger to a rule's effective date, but not always, replacing the word "adoption" with "their effective dates" on page 13, line 21 would clarify that issue.

OTHER SUBSTANTIVE ISSUES

Energy, Minerals and Natural Resources Department reported in its analysis of a substantially similar bill introduced in the 2015 Regular Legislative Session (SB 194) that that bill 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, 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. It drafted a uniform rulemaking bill which was introduced in previous sessions. The 2015 bill evolved from that effort and incorporated amendments proposed at prior sessions and deleted some sections from the original bill. HB 58 continues to advance the effort to establish a uniform rulemaking process.

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

NMDOT suggests changing the effective date of CS/HB 58 to July 1, 2018 to allow agencies additional time to implement the changes in rulemaking mandated in this bill.

MD/sb/jle/al