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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 2/21/23

**SPONSOR** Pettigrew

**BILL**  
**NUMBER** House Bill 409

**SHORT TITLE** Legislative Review of Rules

**ANALYST** Leger

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	\$80.0 - \$200,000.0	Recurring	General Fund
<b>Total</b>		Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	\$80.0 - \$200,000.0	Recurring	Federal Funds
<b>Total</b>		Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	Indeterminate but substantial Ranges between \$40.0 - \$100,000.0	\$80.0 - \$200,000.0	Recurring	Other State Funds

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

- Commission of Public Records (CPR)
- Economic Development Department (EDD)
- Department of Health (DOH)
- Department of Transportation (NMDOT)
- Regulations and Licensing Department (RLD)
- Energy, Minerals and Natural Resources Department (EMNRD)

## SUMMARY

### Synopsis of House Bill 409

House Bill 409 amends the duties of the New Mexico Legislative Council (LCS) to designate an interim committee to review the rules pursuant to the provisions of Section 14-4-4.2 NMSA

1978.

A proposed new section of law, *Rulemaking Prerequisites--Economic Impact Study* (14-4-4.1), directs agencies to conduct an economic study of costs, benefits, and impacts of the proposed rule before publication. Each study shall include:

- The need for the proposed rule;
- The number and identity of municipalities, counties, business sectors or other entities that will be impacted by the proposed rule;
- The estimated cost of compliance with the proposed rule;
- The anticipated benefit derived from compliance with the proposed rule; and
- The extent to which the proposed rule overlaps, duplicates or conflicts with other federal, state and local government rules.

The second proposed new section of law, *Legislative Review of Proposed Rules--Effect of Committee Action* (14-4-4.2), states no rule shall be valid or enforceable until certain procedures have been followed:

- Concurrently with the publication of proposed rule and public hearing the agency proposing to promulgate a rule shall file the proposed rule along with an economic impact study to the Director of LCS, to be forwarded to each member of:
  - Appropriate interim committee; or
  - The LCS.
- A rule and its economic impact shall be reviewed by an interim committee or LCS, within 10 days of the filing with LCS Director, a legislator receiving the economic study and rule requests a legislative review;
- Any proposed rule that has received a written request for legislative review is subject to review by the legislature at the next regular session;
- By the 13<sup>th</sup> day of any regular session in an odd year and the 15<sup>th</sup> day of any regular session in an even year, the standing committee to which a proposed rule and its accompanying economic impact study have been referred may report to the membership of the body its findings and recommendations concerning review of rule. The committee report shall be printed in the journal. If the committee does not report by the specified day, that shall constitute legislative approval. If the committee to which a proposed rule has been referred is of the opinion that the proposed rule is violative of the legislative intent of the statutory authority under which the rule is made the committee may introduce a concurrent resolution amending or rejecting the proposed rule accordingly. If the concurrent resolution is adopted by the Legislature, the rule shall be amended, approved, or rejected accordingly;
- A rule may be filed and published and enforceable if: a timely request for legislative review is not made, a standing committee does not make a timely report on the proposed rule or a resolution is enacted by the Legislature approving or amending the rule; and
- An emergency rule may take effect without a prior filing pursuant to Subsection B but shall be in effect no longer than 60 days. Upon the filing, the emergency rule may remain in effect but shall otherwise be subject to the request for legislative review provisions.

The effective date of this bill is July 1, 2023.

## FISCAL IMPLICATIONS

All agency responses to HB409 indicate the fiscal impact of an economic impact study to proposed rule changes will be significant. Specialized staff, such as economists and legal

counsel, and software would be needed to for agencies conducting their own studies. According to EDD, these types of analyses can be expensive, with an estimated cost of \$40 thousand-\$200 thousand per analysis. In calendar year 2022, 492 rules were adopted and published. The estimated cost would be between \$20 million and \$100 million to run the total amount.

According to DOH, delays in a rule adoption could have any number of fiscal impacts, including but not limited to the loss of federal funding for critical health programs.

According to NMDOT, delays in a rule adoption could result in NMDOT being out of compliance with state or federal law and suffering the withholding of funding. In addition, more staff time to rulemaking, including the time necessary to prepare or coordinate economic impact studies would be required. Allocating more staff time to rulemaking will mean that staff members involved with the rulemaking may have less time to devote to other responsibilities. Due to the variety of rulemaking undertaken by NMDOT, it is not possible to estimate the potential fiscal impact of reallocating staff resources. Additionally, the need to hire outside counsel and/or economists to assist in preparing economic impact studies is anticipated.

According to RLD, there are six department divisions that have direct rulemaking authority/responsibilities for the industries those divisions regulate and more than 30 administratively attached boards and commissions. Each board and commission has administrative rulemaking authority and responsibilities of their own. RLD estimates a cost of approximately \$540 thousand for six additional FTE and increased per diem and mileage expenses for additional meetings of committees of individual boards and commissions for rule drafting/development meetings, as well as meetings of the full boards and commissions to discuss rulemaking activities. This being the case, the fiscal and operational impacts of HB409 may be more severe for RLD than any other state agency.

According to EMNRD, the agency conducts rulemakings each year within each of its divisions: Oil Conservation, Mining and Minerals, State Parks, State Forestry, and Energy Conservation and Management. Economic impact statements could potentially require external studies, research, and the expertise of economists. EMNRD would have to contract for the preparation of economic impact studies on a regular basis as the agency does not have the existing expertise in-house to do the required analysis across all divisions. Since HB409 would impact all divisions, EMNRD would likely need to add resources in program support to manage the studies and any associated contracts and outside resources. The financial impacts above are a conservative estimate of those resources assuming a minimal level of rulemaking each year - \$250.0 for 2 FTE and \$500.0 per year in contract dollars to support the reviews.

## **SIGNIFICANT ISSUES**

EDD reports, in calendar year 2022, 492 rules were adopted and published.

According to DOH, there are logistical hurdles for agencies to adopt rules, and could result in delays of months or even years for an agency to adopt a final rule. This could have any number of fiscal impacts for DOH and other agencies, including but not limited to the loss of federal funding for critical health programs. Even in the case of an emergency rule, there would be no assurance that the rule could continue for longer than the 180 days allowed under the State Rules Act, if the Legislature did not act upon the emergency rule before that period expired.

DOH reports, HB409 would tether the agency rulemaking process to the timing of regular legislative sessions, potentially delaying agencies' adoption of rules. Although the bill would allow emergency rules to remain in effect during the pendency of the legislative process, those emergency rules could expire before the legislative review and approval process could be completed. Because HB409 would require a rule subject to legislative review to first be approved by the Legislature in order to be adopted by an agency, and because this would also apply to final adoption of emergency rules, emergency rules would expire after 180 days if a legislator sought review of the rule and if the Legislature had not yet voted to approve the rule before the 180-day period had lapsed. Pursuant to 14-4-5.6, NMSA 1978, rules can only be adopted as emergency rules (i.e., adopted without first going through the notice and hearing process of the State Rules Act) if following the usual rulemaking procedures would "cause an imminent peril to the public health", "cause the unanticipated loss of funding for an agency program", or "place the agency in violation of federal law". By creating a process that would in some instances prohibit final adoption of emergency rules prior to their expiration, HB409 would cause the very outcomes that emergency rules are intended to avert: the public health would be placed in peril, funding for agency programs would be lost, and agencies would be placed in violation of federal law, all because legislative approval could not be obtained prior to expiration of an emergency rule.

According to RLD, the agency regulates more than 500 thousand individuals and businesses in dozens of industries, professions and trades across the state, through the following divisions: Administrative Services Division, Alcoholic Beverage Control Division, Cannabis Control Division, Construction Industries Division, Financial Institution Division, Manufactured Housing Division, Securities Division, and Boards and Commissions Division (BCD). The BCD alone has oversight of 35 different professions and specialized trades. Each board and commission operates under its own statutory requirements established by the Legislature, and its own set of rules enacted by the agencies to comply with the statutory requirements.

## PERFORMANCE IMPLICATIONS

According to DOH, HB409 could create delays in the adoption of rules. The Legislature is a volunteer body that meets no more than 60 days, and 30 days every other year. It could be difficult for the Legislature to review timely and approve every agency rule that may come before it during the regular legislative session, in addition to the Legislature's usual work. Proposed rules that were not acted upon by the Legislature in the course of a regular session would potentially sit in limbo.

HB409 would require that agencies create economic impact studies, and would require that those studies include information that agencies ordinarily would not have knowledge of. For example, most executive agencies would find it difficult to identify "the number and identity of municipalities, counties, business sectors or other entities that will be impacted by [a] proposed rule", particularly considering that economic impact statements would be required to be filed with the Legislative Council Service prior to a rule hearing being conducted, and therefore prior to public comment being received from affected persons.

NMDOT reports, it is extensively involved in rulemaking and anticipates delays and amendments imposed by the bill could substantively impact its operations. NMDOT oversees a variety of programs that require the department to promulgate new rules, amend existing rules, or

repeal and replace existing rules when the federal government or the Legislature add or makes changes to NMDOT programs, when other state agencies promulgate or amend rules that necessitate NMDOT promulgating or amending its rules, or when other circumstances necessitate promulgating new rules or amending existing rules. The legislative oversight process provided in HB409 could impact NMDOT's ability to promulgate new rules or update existing rules in a timely manner, especially in instances when state legislation or federal law makes it necessary for NMDOT to promulgate new rules or update existing rules in a specific time frame in order to implement or update NMDOT programs. Additionally, HB409 will require the State Transportation Commission to update its Commission Policy 4, which governs NMDOT's rulemaking process, as well as require NMDOT amend its rulemaking administrative directive and rulemaking handbook.

EMNRD reports, HB409 would also considerably lengthen the rulemaking process. The hiring of contractors and the preparation of an economic impact study for each rule would take some time. In addition, the agency would begin its rulemaking process, but then pause its process while the proposed rule went through legislative review, including both an interim committee review and a review at a regular session. Presumably, the agency would then have to renew the process if the Legislature had not rejected the proposal. Conservatively, the legislative review process could add six months to a year to the current rulemaking process. The timing of the legislative review process conflicts with the agency process of preparing a final rule change. HB409 requires the proposed rule change to be submitted to the Legislature prior to a public hearing on the rule. However, during the public hearing process, agencies generally receive proposals to amend the proposed rule and often do amend the rule prior to filing a final version. HB409 may prevent such changes because the original rule proposal is now before the Legislature and presumably can only be amended by the Legislature. If the agency sought to modify its proposal, it appears that the agency would be required to resubmit the proposal to the Legislature.

## TECHNICAL ISSUES

DOH reports, HB409 would create conflicts with existing portions of the State Rules Act, particularly those provisions concerning the timeline for adoption of emergency rules. An additional conflict with federal grant requirements and associated regulations, insofar as the bill would in some cases prevent agencies from adopting time-sensitive rules and rule amendments within time periods necessary to comport with federal law.

EMNRD reports, HB409 requires the filing with the legislature to occur “concurrently with the publication of a proposed rule and prior to any public hearing.” This timing conflicts with the State Rules Act process. The public hearing under Section 14-4-5.3 NMSA 1978 occurs well before the publication of the rule in the New Mexico Register which happens at the end of the rulemaking. Section 14-4-5 NMSA 1978. HB409 makes no distinctions among the wide range of rule changes that are proposed by state agencies each year. A proposed rule change that makes only technical corrections to existing rules would trigger the same economic impact study as a proposed rule that has more significant impacts on state agencies.

Most agencies flagged the bill did not specify what state agencies are required to provide an economic impact. Furthermore, the bill does not specify if the requirements are only for new rules or if it would need to be followed for amendments to rules.

The approval process, when requested by a legislator, does not state that the interim committee

or the legislative council can approve the rule. This would mean that the rule would have to wait until the regular session to be approved. It is recommended that it is clarified by the bill.

It is unclear as to whether the provisions of the bill apply to “in process” rulemaking that has been initiated before the effective date of July 1, 2023, should the bill become law.

A rule can be approved if a “timely request for legislative review is not made” but does not define timely. This can create confusion and it should be clarified by the bill.

## OTHER SUBSTANTIVE ISSUES

DOT reports the following:

HB409 presents separation of powers issues.

The legislature has delegated substantive regulatory authority to the executive agencies of the state while prescribing the procedure for rulemaking in the State Rules Act. HB 409 not only amends the rulemaking procedure, which is prescribed by the legislature, but also gives the legislature authority to amend or reject proposed rules of the executive branch. This creates a possible conflict wherein the legislature can substitute its judgment for the judgment of subject matter experts in the state agencies, including at the risk of impeding time sensitive rulemaking processes.

Additionally, HB409 would remove from the courts, and give to the legislature, the review of executive branch rules to ensure such rules are promulgated in accordance with the legislative intent of the authorizing statute(s). This, too, would be inconsistent with separation of powers.

EMNRD also reports the following:

HB409 may be subject to challenge as violating the separation of powers provision under the New Mexico Constitution. N.M. Const. Article III, section 1.

*The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.*

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