

## RESTRICT STATE AGENCIES FROM ADOPTING RULES MORE STRINGENT THAN FEDERAL RULES

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<http://www.house.mi.gov/hfa>

House Bill 4205 (reported from committee as H-3)

Sponsor: Rep. Triston Cole

Committee: Oversight

Complete to 4-18-17

Analysis available at  
<http://www.legislature.mi.gov>

### SUMMARY:

House Bill 4205 would amend Sections 32 and 45 of the Administrative Procedures Act of 1969, effective January 1, 2018, to:

- Prohibit a state agency from adopting rules more stringent than an applicable *federally-mandated standard* unless the director of that agency determines that the preponderance of the evidence establishes a need to exceed the federal standard.
- In cases where the federal government has *not mandated* that Michigan promulgate rules, prohibit a state agency from promulgating a more stringent rule than the applicable federal standard unless specifically authorized to do so by state statute, or unless the director of that agency determines that the preponderance of the evidence establishes a need to exceed the federal standard.

There would be an exception in both cases for emergency rules promulgated under Section 48 of the APA, which applies generally to rules aimed at the preservation of the public health, safety, or welfare.

If a proposed rule was more stringent than the applicable federal standard, the required regulatory impact statement would have to contain a statement of the specific facts that support the agency director's finding that a preponderance of the evidence establishes a need to adopt the more stringent rule, and an explanation of the exceptional circumstances that necessitate the more stringent standard. If the stringent rules were authorized by statute, then the regulatory impact statement could cite the statute that specifically authorizes the more stringent rule.

(Note: As introduced the bill would have required that an agency demonstrate that there was "a clear and convincing" need to adopt more stringent standards. The "preponderance of the evidence" standard in the substitute is considered an easier standard to meet.)

### FISCAL IMPACT:

House Bill 4205 would have an indeterminate fiscal impact on the state government. The magnitude and direction of this impact would depend on two factors: (1) the number of administrative rules that are more "stringent" than federal standards; and (2) the costs associated with enforcing the "stringent" provisions of these rules. It is not entirely clear what constitutes a "stringent" rule, and this uncertainty could require additional legislative

guidance and/or judicial interpretation. Determining the enforcement costs would require financial analysis by the Office of Performance and Transformation to isolate the costs of enforcing the "stringent" provisions of administrative rules.

## **DISCUSSION:**

Proponents of the bill, notably representatives of small business, say the bill is simply a common sense reform that requires more scrutiny and justification before rules stricter than those required by the federal government are imposed. This will ease the burden on state residents, property owners, and businesses, and improve the state's business climate by reducing overregulation and associated costs. In the substitute form, the bill requires the need for more stringent rules be demonstrated by a "preponderance of the evidence," which is a lower standard than advocated in earlier versions of this legislation.

Moreover, this version of the legislation has been drafted with the previous gubernatorial veto in mind, and allows for state statutes to authorize more stringent-than-federal rules; allows agency heads to make the case for such rules in regulatory impact statements that are a mandated part of the rules promulgation process; and provides for instances where emergency rules are needed for the preservation of the public health, safety, or welfare.

Opponents of the bill have made the following points:

- In many cases, federal regulations are intended to be a floor for state regulation, not a ceiling, and state level officials are the best judge of the unique circumstances that justify different standards for different locales. The current rules process has sufficient protections and opportunities for public input built in.
- In the case of Michigan, the need for special protections for the surrounding Great Lakes alone is justification for more stringent environmental and water quality regulations, which could be thwarted under this bill.
- The lack of definition of "stringent" and the vagueness that could plague evaluations of "preponderance of the evidence" will likely lead to more litigation and hinder the state from creating rules to protect the public.
- A somewhat similar, albeit more severe, bill was vetoed<sup>1</sup> by Governor Snyder in 2011, who said it "sent the right message in the wrong way," and cited past and potential future needs for special regulations in such areas as ballast water, phosphorous discharge, cattle TB prevention, OSHA regulations, and Medicaid fraud, along with concerns about the identification of what constitutes an "applicable federal standard" when devising state regulation.

## **POSITIONS:**

Among those indicating support for the bill to the Oversight Committee on 3-16-17 or 3-23-17 were the National Federation of Independent Business (NFIB) and the Michigan Chamber of Commerce;

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<sup>1</sup> [http://www.legislature.mi.gov/\(S\(5bqyg5jsproc1asewsiuynwk\)\)/documents/2011-2012/Journal/House/pdf/2011-HJ-12-06-097.pdf](http://www.legislature.mi.gov/(S(5bqyg5jsproc1asewsiuynwk))/documents/2011-2012/Journal/House/pdf/2011-HJ-12-06-097.pdf)

Among those indicating opposition to the bill on 3-16-17 or 3-23-17 were: The Michigan Environmental Council; the Sierra Club, Michigan Chapter; the Michigan League of Conservation Voters; UAW, Local 600; and the League of Women Voters–Michigan.

The Office of Regulatory Reinvention indicated neutrality on 3-15-17.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.