

HOUSE BILL No. 4240

February 10, 2011, Introduced by Reps. Goike, Tyler, Johnson, McMillin, Muxlow, LaFontaine, Kowall, Outman, Zorn, Callton and Shaughnessy and referred to the Committee on Regulatory Reform.

A bill to amend 1969 PA 306, entitled "Administrative procedures act of 1969," by amending sections 32, 40, 43, 61, and 64 (MCL 24.232, 24.240, 24.243, 24.261, and 24.264), section 40 as amended by 1999 PA 262, section 43 as amended by 1989 PA 288, and section 61 as amended by 1982 PA 413.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 32. (1) Definitions of words and phrases and rules of
2 construction prescribed in any statute ~~, and which~~ **THAT** are made
3 applicable to all statutes of this state ~~, also~~ apply to rules
4 unless clearly indicated to the contrary.

5 (2) A rule or exception to a rule shall not discriminate in
6 favor of or against any person. ~~, and a~~ **A** person affected by a rule
7 is entitled to the same benefits as any other person under the same

1 or similar circumstances.

2 (3) The violation of a rule is a crime when so provided by
3 statute. ~~A UNLESS PROVIDED FOR BY STATUTE, A~~ rule shall not ~~make an~~
4 ~~act or omission to act a crime or~~ **DESIGNATE AN ACT OR OMISSION AS A**
5 **CRIME AND SHALL NOT** prescribe a criminal penalty for violation of a
6 rule.

7 (4) An agency may adopt, by reference in its rules and without
8 publishing the adopted matter in full, all or any part of a code,
9 standard or regulation ~~which~~ **THAT** has been adopted by an agency of
10 the United States or by a nationally recognized organization or
11 association. The reference shall fully identify the adopted matter
12 by date and otherwise. The reference shall not cover any later
13 amendments and editions of the adopted matter, but if the agency
14 wishes to incorporate them in its rule it shall amend the rule or
15 promulgate a new rule therefor. The agency shall have available
16 copies of the adopted matter for inspection and distribution to the
17 public at cost and the rules shall state where copies of the
18 adopted matter are available from the agency and the agency of the
19 United States or the national organization or association and the
20 cost thereof as of the time the rule is adopted.

21 (5) **AN AGENCY SHALL NOT PROMULGATE OR ADOPT A RULE MORE**
22 **STRINGENT THAN THE APPLICABLE FEDERAL STANDARD UNLESS SPECIFICALLY**
23 **AUTHORIZED BY STATUTE.**

24 (6) **IF AN AGENCY ADOPTS RULES IN ORDER TO IMPLEMENT A**
25 **FEDERALLY DELEGATED PROGRAM, THE AGENCY SHALL ADOPT THE RULES AND**
26 **STANDARDS AS PROMULGATED OR ADOPTED BY THE FEDERAL GOVERNMENT**
27 **UNLESS A MORE EFFICIENT PROCESS IS SPECIFICALLY AUTHORIZED BY**

1 STATUTE.

2 (7) A GUIDELINE, OPERATIONAL MEMORANDUM, BULLETIN,
 3 INTERPRETIVE STATEMENT, OR FORM WITH INSTRUCTIONS IS CONSIDERED
 4 MERELY ADVISORY AND SHALL NOT BE GIVEN THE FORCE AND EFFECT OF LAW.
 5 AN AGENCY SHALL NOT RELY UPON A GUIDELINE, OPERATIONAL MEMORANDUM,
 6 BULLETIN, INTERPRETIVE STATEMENT, OR FORM WITH INSTRUCTIONS TO
 7 SUPPORT THE AGENCY'S DECISION TO ACT OR REFUSE TO ACT IF THAT
 8 DECISION IS SUBJECT TO JUDICIAL REVIEW. A COURT SHALL NOT RELY UPON
 9 A GUIDELINE, OPERATIONAL MEMORANDUM, BULLETIN, INTERPRETIVE
 10 STATEMENT, OR FORM WITH INSTRUCTIONS TO UPHOLD AN AGENCY DECISION
 11 TO ACT OR REFUSE TO ACT.

12 (8) WHERE A STATUTE PROVIDES THAT AN AGENCY MAY PROCEED BY
 13 RULE-MAKING OR BY ORDER AND AN AGENCY PROCEEDS BY ORDER IN LIEU OF
 14 RULE-MAKING, THE ORDER SHALL NOT BE GIVEN GENERAL APPLICABILITY TO
 15 PERSONS WHO WERE NOT PARTIES TO THE PROCEEDING OR CONTESTED CASE
 16 PRIOR TO THE ISSUANCE OF THE ORDER.

17 (9) A RULE SHALL NOT EXCEED THE RULE-MAKING DELEGATION
 18 CONTAINED IN THE STATUTE AUTHORIZING THE RULE-MAKING.

19 Sec. 40. (1) When an agency proposes to adopt a rule that will
 20 apply to a small business and the rule will have a disproportionate
 21 impact on small businesses because of the size of those businesses,
 22 the agency **SHALL CONSIDER EXEMPTING SMALL BUSINESSES AND, IF NOT**
 23 **EXEMPTED, THE AGENCY** proposing to adopt the rule shall reduce the
 24 economic impact of the rule on small businesses by doing ~~1 or more~~
 25 **ALL** of the following when it is lawful and feasible in meeting the
 26 objectives of the act authorizing the promulgation of the rule:

27 (A) IDENTIFY AND ESTIMATE THE NUMBER OF SMALL BUSINESSES

1 **AFFECTED BY THE PROPOSED RULE AND ITS PROBABLE EFFECT ON SMALL**
2 **BUSINESSES.**

3 (B) ~~(a)~~—Establish differing compliance or reporting
4 requirements or timetables for small businesses under the rule
5 **AFTER PROJECTING THE REQUIRED REPORTING, RECORD-KEEPING, AND OTHER**
6 **ADMINISTRATIVE COSTS.**

7 (C) ~~(b)~~—Consolidate, ~~or~~ simplify, **OR ELIMINATE** the compliance
8 and reporting requirements for small businesses under the rule **AND**
9 **IDENTIFY THE SKILLS NECESSARY TO COMPLY WITH THE REPORTING**
10 **REQUIREMENTS.**

11 (D) ~~(c)~~—Establish performance ~~rather than design standards,~~
12 ~~when appropriate~~ **STANDARDS TO REPLACE DESIGN OR OPERATIONAL**
13 **STANDARDS REQUIRED IN THE PROPOSED RULE.**

14 ~~——(d) Exempt small businesses from any or all of the~~
15 ~~requirements of the rule.~~

16 (2) **THE FACTORS DESCRIBED IN SUBSECTION (1) (A) TO (D) SHALL BE**
17 **SPECIFICALLY ADDRESSED IN THE SMALL BUSINESS IMPACT STATEMENT.**

18 (3) ~~(2)~~ ~~If appropriate in~~ **IN** reducing the disproportionate
19 economic impact on small business of a rule as provided in
20 subsection (1), an agency ~~may~~ **SHALL** use the following
21 classifications of small business:

22 (a) 0-9 full-time employees.

23 (b) 10-49 full-time employees.

24 (c) 50-249 full-time employees.

25 (4) ~~(3)~~—For purposes of subsection ~~(2)~~ **(3)**, an agency may
26 include a small business with a greater number of full-time
27 employees in a classification that applies to a business with fewer

1 full-time employees.

2 (5) ~~(4)~~ This section and section 45(3) do not apply to a rule
3 ~~which~~**THAT** is required by federal law and ~~which~~**THAT** an agency
4 promulgates without imposing standards more stringent than those
5 required by the federal law.

6 Sec. 43. (1) Except in the case of an emergency rule
7 promulgated in the manner described in section 48, a rule is not
8 valid unless processed in compliance with ~~section 42~~**SECTIONS 39,**
9 **40, 42, AND 45(3)** and unless in substantial compliance with section
10 41(2), (3), (4), and (5).

11 (2) A proceeding to contest **THE VALIDITY OF THE PROCESSING OF**
12 a rule on the ground of noncompliance with the requirements of
13 ~~sections~~**SECTION 39, 40, 41, and 42, OR 45(3), OR ANY COMBINATION**
14 **THEREOF**, shall be commenced within 2 years after the effective date
15 of the rule.

16 (3) **AN AGENCY DETERMINED TO HAVE VIOLATED THIS CHAPTER**
17 **REGARDING THE PROCESSING OF A RULE IS LIABLE FOR DAMAGES AS AWARDED**
18 **IN AN ACTION BROUGHT UNDER SECTION 64(2).**

19 Sec. 61. (1) The filing of a rule under this act raises a
20 rebuttable presumption that the rule was adopted, filed with the
21 secretary of state, and made available for public inspection as
22 required by this act.

23 (2) The publication of a rule in the Michigan register, the
24 Michigan administrative code, or in an annual supplement to the
25 code raises a rebuttable presumption that **THE FOLLOWING OCCURRED:**

26 (a) The rule was adopted, filed with the secretary of state,
27 and made available for public inspection as required by this act.

1 (b) The rule printed in the publication is a true and correct
2 copy of the promulgated rule.

3 ~~(c) All requirements of this act relative to the rule have~~
4 ~~been complied with.~~

5 (3) The courts shall take judicial notice of a rule ~~which~~ **THAT**
6 becomes effective under this act.

7 Sec. 64. **(1)** Unless an exclusive procedure or remedy is
8 provided by a statute governing the agency, the validity or
9 applicability of a rule, **INCLUDING THE FAILURE OF AN AGENCY TO**
10 **ACCURATELY ASSESS THE IMPACT OF THE RULE ON BUSINESSES, INCLUDING**
11 **SMALL BUSINESSES, IN ITS REGULATORY IMPACT STATEMENT,** may be
12 determined in an action for declaratory judgment ~~when~~ **IF** the court
13 finds that the rule or its threatened application interferes with
14 or impairs, or imminently threatens to interfere with or impair,
15 the legal rights or privileges of the plaintiff. The action shall
16 be filed in the circuit court of the county where the plaintiff
17 resides or has his **OR HER** principal place of business in this state
18 or in the circuit court for Ingham county. The agency shall be made
19 a party to the action. ~~An action for declaratory judgment may not~~
20 ~~be commenced under this section unless the plaintiff has first~~
21 ~~requested the agency for a declaratory ruling and the agency has~~
22 ~~denied the request or failed to act upon it expeditiously.~~ This
23 section shall not be construed to prohibit the determination of the
24 validity or applicability of the rule in any other action or
25 proceeding in which its invalidity or inapplicability is asserted.

26 **(2) A PERSON ALLEGING A VIOLATION OF CHAPTER 3 REGARDING THE**
27 **PROCESSING OF A RULE MAY BRING AN ACTION FOR DAMAGES IN THE CIRCUIT**

1 COURT OF THE COUNTY IN WHICH THE PLAINTIFF RESIDES OR IN THE
2 CIRCUIT COURT FOR INGHAM COUNTY. IF THE COURT DETERMINES THAT SUCH
3 A VIOLATION HAS OCCURRED, IT MAY AWARD UP TO 10 TIMES THE COST OF
4 ANY PERMIT FEES AS WELL AS THE ACTUAL AND REASONABLE COSTS INCURRED
5 FOR WITNESS AND ATTORNEY FEES.