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BILL ANALYSIS



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Senate Bill 962 (as introduced 5-17-16)
Sponsor: Senator Jim Stamas
Committee: Oversight

Date Completed: 5-25-16

CONTENT

The bill would amend the Administrative Procedures Act to do the following regarding the promulgation of administrative rules:

- Allow the Joint Committee on Administrative Rules (JCAR), within 15 session days after receiving a proposed rule, to object to the rule (as currently provided), propose that the rule be changed, or decide to introduce bills to enact the subject of the rule.**
- Require the agency proposing the rule, if JCAR proposed to change it, either to change and resubmit the rule or to notify JCAR of its decision not to change the rule.**
- Give JCAR 15 session days to take one of the actions it could take after receiving a proposed rule, if the agency decided not to change a rule that JCAR proposed to change.**
- Require the Office of Performance and Transformation (OPT), if an agency decided to change a proposed rule, to determine whether the regulatory impact or impact on small businesses of the changed rule would be more burdensome than the impact of the rule originally proposed.**
- Require the agency, after receiving the OPT's determination, to prepare a supplement to the report that the agency is required to prepare.**
- Require the agency to prepare a new agency report and hold a new public hearing, if the OPT determined that the impact of a changed rule would be more burdensome than the impact of the original proposed rule.**
- Provide that the language of a bill introduced to enact a proposed rule would not have to be identical to the language of the rule.**
- Provide that, if JCAR introduced bills to enact a rule, the rule could not be filed with the Secretary of State until one year after the legislation was introduced.**

The bill would take effect on January 1, 2017.

Overview of Rule-Making Process

Chapter 3 of the Act prescribes the process for a State agency to promulgate an administrative rule, which is a regulation, standard, policy, or ruling of general applicability that implements or applies law enforced or administered by the agency, or prescribes the agency's organization, procedure, or practice. The process begins when a State department submits a request for rule-making to the Office of Performance and Transformation. If the OPT approves the request, the rule is drafted and submitted to the Office. At both stages, notice is given to the Joint Committee on Administrative Rules. The agency must prepare a regulatory impact statement and a cost-benefit analysis, submit them to the OPT, and hold a public hearing on

the proposed rule. Notice of the hearing and the proposed rule must be published in the *Michigan Register*.

After the public hearing and a certification process, the OPT submits a final draft of the rule to JCAR, which has 15 legislative session days to object to the rule or waive the 15-session-day period. If JCAR does not object to the rule, the OPT may file the rule with the Secretary of State. The rule will take effect when it is filed, unless it specifies a later date.

(The Office of Performance and Transformation was created within the State Budget Office by Executive Order 2016-4. Previously, the administrative rule functions of the OPT were performed by the Office of Regulatory Reinvention (ORR), which Executive Order 2016-4 abolished. Before the ORR was created, administrative rule-making authority was held by the State Office of Administrative Hearings and Rules (now the Michigan Administrative Hearing System), which had taken over that responsibility from the former Office of Regulatory Reform.)

The bill would amend the Act to define "office" as the Office of Performance and Transformation, and would delete references to the ORR in Chapter 3. The bill also specifies that "Office of Regulatory Reinvention", "State Office of Administrative Hearings and Rules", and "Office of Regulatory Reform" would mean the OPT.

JCAR Response to Proposed Rules

The Joint Committee on Administrative Rules consists of five members of the Senate and five members of the House of Representatives, and is housed within the Legislative Council. From each chamber, three members must be from the majority party and two from the minority party. The chairperson of the Committee must alternate between the House and the Senate each year.

When a proposed rule is transmitted to JCAR, the Committee has 15 session days to consider the rule and object to the rule by approving a notice of objection by a concurrent majority. Alternatively, JCAR may waive the remaining session days. The Committee may approve a notice of objection only for specific reasons, e.g., the agency lacks statutory authority for the rule, the rule conflicts with State law, the rule is arbitrary or capricious, or the rule is unduly burdensome to the public or to a licensee. If JCAR objects to a rule, the chairperson, alternate chairperson, or any member of the Committee must introduce bills in both houses of the Legislature to do one of the following: 1) rescind the rule upon its effective date; 2) repeal the statutory provision under which the rule was authorized; or 3) stay the effective date of the rule for up to one year.

Under the bill, when a proposed rule was transmitted to JCAR, the Committee could do any of the following:

- Object to the rule, as currently provided.
- Propose that the rule be changed.
- Decide to introduce bills to enact the subject of the rule into law.

If JCAR proposed that the rule be changed, the agency proposing the rule would have to comply with procedures set forth in the bill (described below).

If JCAR decided to introduce bills to enact the subject the rule, the chairperson and alternate chairperson of the Committee immediately have to introduce bills in both houses of the Legislature, as soon as the bills had been prepared. The language of the bills would not have to be identical to the language of the proposed rule.

Also, if JCAR introduced bills to codify a proposed rule, the OPT could not file the rule with the Secretary of State until one year after the bills were introduced.

Currently, if legislation introduced after JCAR objects to a rule is defeated in either house of the Legislature and the vote is not reconsidered, or if the legislation is not adopted by both houses within the time specified, the OPT may file the rule with the Secretary of State, and the rule will take effect upon being filed unless it specifies a later date. Under the bill, these provisions also would apply to legislation introduced to codify a proposed rule.

Currently, if legislation is enacted after JCAR objects to a rule and is presented to the Governor within the 15-session-day period, the rule does not take effect unless the Governor vetoes the legislation. Under the bill, this also would apply if the legislation were enacted to codify the subject of a rule and were presented to the Governor within one year after the legislation was introduced.

Agency Withdrawal of Proposed Rule

The Act allows an agency to withdraw a proposed rule and resubmit it with permission of the chairperson and alternate chairperson of JCAR. If permission is granted, the 15-session-day period is tolled until the rule is resubmitted, although JCAR must have at least six session days after resubmission to consider the rule.

An agency also may withdraw and resubmit a rule without JCAR's permission. If this occurs, a new and untolled 15-session-day time period begins when the rule is resubmitted.

Under the bill, in either case, an agency could withdraw a rule in order to change it, and could resubmit the rule as changed.

Also, if a rule were withdrawn with JCAR's permission, the 15-session-day period would be extended, if necessary, to give the Committee six days to review the resubmitted rule.

Rule Proposed to be Changed by JCAR

If JCAR proposed that a proposed rule be changed, the bill would require the agency that proposed the rule to do one of the following within 30 days:

- Decide to change the rule and resubmit it, as changed, to JCAR.
- Decide not to change the rule.

If the agency decided not to change the rule, within the 30-day period, the agency would have to notify JCAR of the decision and the reasons for it, and file the notice with the OPT. After the notice was filed, JCAR would have 15 session days to consider the agency's decision and take one of the actions authorized upon transmittal of a proposed rule.

If the agency decided to change the rule and resubmit it, as changed, to JCAR, the agency would have to withdraw the rule. The withdrawal would be a withdrawal with permission. After withdrawing the rule, the agency would have to give notice to the OPT for publication of the proposed rule, as changed, in the *Michigan Register*. The notice would have to include the text of the changed rule.

The OPT would have to review the proposed rule as changed, and determine whether its regulatory impact or the impact on small businesses would be more burdensome than the impact of the rule as originally proposed. If the language of the changed rule were identical to the language of the corresponding rule promulgated and in effect at the time of the review, the regulatory impact and impact on small businesses of the rule as changed would not be more burdensome. The OPT would have to notify the agency of its determination.

If the OPT determined that the regulatory impact and impact on small businesses of the proposed rule as changed would not be more burdensome, the agency would not be required to prepare a new agency report of the rule's regulatory impact. In addition, Sections 41 and 42 of the Act would not apply (Those sections prescribe requirements for notice of a public hearing and publication of the notice, as well as requirements concerning the hearing.)

If the OPT determined that the regulatory impact and the impact on small businesses of the rule as changed would be more burdensome, the agency would have to prepare a new agency report under Section 45(2) and conduct a new public hearing. The public hearing could be conducted as a hearing by JCAR according to procedures applicable to a hearing by the Committee, rather than being conducted as otherwise required by the Act. A quorum of the Committee would not be necessary, however, and JCAR could not vote on any matter related to the rule as changed.

(Section 45(2) requires an agency, before formally adopting a proposed rule, to prepare an agency report containing various items, including a regulatory impact statement. The statement must contain information specified in the Act, such as a comparison of the proposed rule to parallel Federal rules or standards set by a state or national licensing agency, an identification of the behavior the rule is designed to alter and the harm resulting from that behavior, an estimate of actual statewide compliance costs of the proposed rule on individuals and on businesses and other groups, and an identification of any disproportionate impact the proposed rule may have on small businesses because of their size. The OPT must transmit the agency report and other items to JCAR.)

After receiving the OPT's determination as to whether the proposed rule as changed would be more burdensome, the agency would have to submit a supplement to its report under Section 45(2). The supplement would have to include both of the following:

- A statement of the OPT's determination and whether a new agency report and public hearing would be required.
- An explanation of the proposed changed rule.

Submission of Records to JCAR

The Act requires an agency, within one year after the last public hearing on a proposed rule, to submit to JCAR records pertaining to the agency report under Section 45(2) and other records, unless the proposed rule is a resubmission of a withdrawn rule. The bill would delete that exception.

MCL 24.205 et al.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Joe Carrasco

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.