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BILL ANALYSIS

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Senate Bill 962 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Jim Stamas
Committee: Oversight

Date Completed: 9-29-16

RATIONALE

Michigan's Administrative Procedures Act sets out the process for a State agency to adopt, or "promulgate", administrative rules, which generally are regulations that implement or apply law enforced by the agency. The process involves a series of steps that begin when an agency submits a request for rule-making to Office of Performance and Transformation (OPT), and concludes when the OPT files the rule with the Secretary of State. During the process, various notice, certification, and public hearing requirements must be met, the agency proposing the rule must prepare certain regulatory impact statements, and the proposed rule must be submitted to the legislative Joint Committee on Administrative Rules (JCAR). The Committee may object to the rule on specific grounds within 15 legislative session days. If JCAR does object, legislation must be introduced to prevent the rule from taking effect or delay its effective date. If the legislation is not enacted, the OPT may file the rule with the Secretary of State.

Since the rule promulgation process was first established, the role of JCAR and the Legislature has been expanded and reduced, as a result of legislation and litigation. Some people believe that, under the current process, JCAR does not have enough opportunity to provide input or address public concerns. It has been suggested that the Act should give JCAR additional options to respond to a proposed rule.

CONTENT

The bill would amend the Administrative Procedures Act to do the following:

- **Allow the Joint Committee on Administrative Rules, 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, 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.**
- **Allow an agency to withdraw a proposed rule and resubmit it as changed, after JCAR considered the rule.**

The bill would take effect on January 1, 2017.

Overview of Rule-Making Process

The Act defines "rule" as an agency regulation, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the agency's organization, procedure, or practice. Chapter 3 of the Act governs the rule promulgation process.

Under Chapter 3, if an agency submits a request for rule-making to the Office of Performance and Transformation and the OPT approves the request, the rule is drafted and submitted to the Office. The OPT must notify JCAR of its approval of the request and the draft rule. 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 is held and the Legislative Service Bureau certifies the rule for form, classification, and arrangement, the OPT must submit a final draft of the rule to JCAR. The Committee then has 15 legislative session days to object to the rule, or it may waive the 15-session-day period. If JCAR objects, legislation must be introduced in both houses of the Legislature to stop the rule from taking effect or delay it. If JCAR does not object to the rule, or legislation is introduced but not enacted, the OPT may file the rule with the Secretary of State. The rule will take effect when 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, which Executive Order 2016-4 abolished. Before that Office 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.)

Office of Performance and Transformation

The bill would define "office" as the Office of Performance and Transformation, and would delete references to the Office of Regulatory Reinvention 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 JCAR must alternate between the House and the Senate each year. Action by JCAR must be by concurring majorities of the members from each house.

When the OPT transmits a proposed rule to JCAR, the Committee has 15 session days to consider the rule and object to it by approving a notice of objection. 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, it must approve a notice of objection by a concurrent majority and file it with the OPT, and the chairperson, the alternate chairperson, or any member of the Committee must introduce bills in both houses of the Legislature to do one of the following:

- Rescind the rule upon its effective date.
- Repeal the statutory provision under which the rule was authorized.
- Stay the effective date of the rule for up to one year.

If JCAR files a notice of objection, the OPT may not file the rule with the Secretary of State until 15 session days after the notice is filed, unless the notice is rescinded sooner.

Under the bill, when the OPT transmitted a proposed rule 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, or cause bills to be introduced, 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. The Legislative Service Bureau would have to give priority to preparing the bills.

If JCAR introduced bills to enact the subject of 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 is introduced after JCAR objects to a rule and the legislation 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 the subject of 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.

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, within 30 days, 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.

(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.

Agency Withdrawal of Proposed Rule

Under the Act, after a rule has been transmitted to JCAR, the agency proposing the rule may withdraw it and resubmit the rule 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.

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.

BACKGROUND¹

The Administrative Procedures Act (APA) originally was enacted in 1943 and did not provide for a legislative role in the rule-making process. That was changed by amendments enacted in 1947 and later. Subsequently, several Attorneys General found that the Legislature's role was unconstitutional. Public Act 306 of 1969 then repealed the 1943 statute and recodified the APA.

The 1969 Act created (or recreated) the Joint Committee on Administrative Rules, required an agency proposing a rule to notify JCAR, and permitted the Committee to hold a hearing on the rule. The Act also provided that, if JCAR, an appropriate standing committee, or a member of the Legislature believed that a promulgated rule was unauthorized, not within legislative intent, or inexpedient, the committee or member could either 1) introduce a bill that amended or rescinded the rule; or 2) introduce a concurrent resolution expressing the determination of the Legislature that the rule should be amended or rescinded. If adopted, the concurrent resolution constituted legislative disapproval of the rule.

Public Act 171 of 1971 expanded JCAR's role by giving the Committee two months to consider proposed rules and authorizing it to disapprove the rules within that period. If JCAR disapproved the rules, it was required to cause a concurrent resolution to be introduced in the House of Representatives or the Senate, or both. If the Legislature adopted the resolution, the agency could not formally adopt the rules or file them with the Secretary of State, but could make minor modifications in the rules and resubmit them. If JCAR approved the rules within the two-month period or the Legislature did not adopt the concurrent resolution disapproving the rules within three months after they were transmitted to JCAR or within one month after the resolution was introduced, whichever was earlier, the agency could proceed to adopt the rules.

Public Act 108 of 1977 revised these provisions, giving JCAR 60 days to approve a rule after receiving an agency's letter transmitting the rule, and allowing it to extend the period to 90 days. If JCAR disapproved the rule or neither approved nor disapproved it within the time frame, the Committee was required to report to the Legislature and return the rule to the agency. The agency then could not adopt or promulgate the rule unless 1) the Legislature passed a concurrent resolution adopting the rule within 60 days after receiving the report; or 2) JCAR subsequently approved the rule. The 1977 amendments also allowed an agency to withdraw a proposed rule with JCAR's permission and resubmit a withdrawn rule or a rule returned by JCAR with minor modification.

Public Act 108 was enacted without the approval of then-Governor Milliken. Before it took effect on January 1, 1978, the Governor requested the Michigan Supreme Court to issue an Advisory Opinion on the constitutionality of the Act. The Court declined to do so until a controversy arose in a factual setting (402 Mich 83).

In 1995, the Michigan Department of Corrections (DOC) proposed a series of rules that limited inmate visitation, and submitted the rules to JCAR. After public hearings, JCAR did not approve the rules. The Department then withdrew the rules from the Committee, adopted them without JCAR's approval, and forwarded them to the Governor and the Office of Regulatory Reform, which sent the rules to the Secretary of State. The rules then became effective.

Prison inmates challenged the validity of the rules, claiming that they were unconstitutional. On March 21, 1997, a panel of the Michigan Court of Appeals held that the legislative approval requirements of the APA were unconstitutional. The Court found that these provisions violated the "enactment and presentment" clauses of Article IV of the State Constitution, which require all legislation to be by bill and require bills passed by the Legislature to be presented to the Governor. The Court also held that the authority granted to JCAR violated the doctrine of separation of powers. The Court upheld the Department's visitation rules, finding that they were promulgated in compliance with the Act and the Department's enabling statute (*Blank v. Department of Corrections*, 222 Mich App 385).

¹ For a detailed discussion of the history of JCAR and changes in the rule-making process, please see the Senate Fiscal Agency issue paper, "The Evolving Role of the Joint Committee on Administrative Rules", published in August 2016: <http://www.senate.michigan.gov/sfa/publications/issues/adminrules/adminrules.pdf>

In a decision issued on June 20, 2000, a majority of the justices of the Michigan Supreme Court agreed that the legislative approval requirements were unconstitutional (462 Mich 102). The Court concluded, "When the Legislature engages in 'legislative action' it must do so by enacting legislation. Failure of JCAR or the Legislature to do so violates the enactment and presentment requirements, usurps the Governor's role in the legislative process, and violates the separation of powers provisions."

Not long before the Supreme Court issued its decision in *Blank*, Public Act 262 of 1999 was enacted and took effect on effect on April 1, 2000. The legislation amended the APA to revise the rule promulgation process, including the role of JCAR and the Legislature. Although Chapter 3 has amended a number of times since 1969, the current provisions closely resemble the version enacted in 1969. Two changes enacted in 2004 are worth noting, however. Public Act 491 of 2004 changed the time period for JCAR to act, after transmission of a rule, from 21 calendar days to 15 session days. In addition, Public Act 491 retained language permitting JCAR, an appropriate standing committee, or a legislator to introduce a bill that amends or rescinds a rule that the committee or member believes is unauthorized, not within legislative intent, or inexpedient. Public Act 491, however, deleted the authority of the committee or a legislator to introduce a concurrent resolution expressing the determination of the Legislature that the rule should be amended or rescinded.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Regarding the roles of State departments and the Legislature in the rule-making process, the pendulum has swung too far in the direction of the executive branch. Rulings of the courts and previous amendments to the APA have left the Joint Committee on Administrative Rules with an overly diminished role. In *Michigan Charitable Gaming Association v. State of Michigan*, the Court of Appeals recognized the extent to which JCAR's authority has been curtailed (310 Mich App 584). The Court described several ways in which JCAR had broader authority in the past, and stated, "This is in contrast to...JCAR's limited role in either rejecting a rule for a limited number list of reasons, or taking no action in regard to the rule, which essentially leads to promulgation of the rule...".

The bill would help restore the balance of power and the involvement of JCAR and the Legislature in administrative rule-making. Under the bill, the Committee could object to a proposed rule as it currently may do, propose that a rule be changed by the agency, or decide to introduce bills on the subject of the rule. This would give JCAR several options to respond to a proposed rule in the manner that it considered appropriate. If the Committee objected to a rule, the existing procedures for introducing legislation still would apply. If JCAR proposed that an agency change a proposed rule and the agency decided to do so, there would be new procedures for a determination of the changed rule's regulatory impact and, if it would be more burdensome than the original proposed rule, a new public hearing would have to be conducted. When this process was completed, the changed rule would be resubmitted to JCAR. These procedures would help ensure that an agency was responsive to input from JCAR and that the changed rule was the product of public participation in the rule-making process.

If the Committee decided to introduce bills on the subject of a rule, the OPT would have to wait a year before filing the rule with the Secretary of State. If the legislation were enacted, there would be no need for the agency proposing the rule to pursue it. If the legislation were not enacted within a year, the rule could be promulgated. Although the current Act authorizes JCAR to introduce bills that prevent a proposed rule from taking effect, the Legislature has only 15 session days to pass that legislation. If the legislation is not passed by both the House and the Senate within that time frame, or is passed but vetoed by the Governor, the rule can be filed with the Secretary of State.

These measures would enhance JCAR's role in the rule-making process and create additional opportunities for public input.

Supporting Argument

Businesses are faced with an avalanche of regulations at the Federal, State, and local levels, which can be burdensome and costly. According to Committee testimony submitted by the National Federation of Independent Businesses, the most recent data available show that Federal regulations on small businesses (firms with fewer than 50 employees) alone averaged \$11,724 per employee in 2012, which is up from \$10,585 in 2010, and the amount is even higher for the manufacturing industry. By giving JCAR more flexibility, and helping to restore the Legislature's involvement in the rule-making process, the bill would allow for more scrutiny and oversight in the promulgation of rules.

Supporting Argument

The bill would codify the ruling of the Court of Appeals in *Michigan Charitable Gaming Association* by permitting an agency to withdraw a rule in order to change it, and resubmit the rule as changed. Although the language of the APA permits an agency to withdraw a rule and resubmit it, with or without JCAR's permission, the Act is silent on whether the agency may make changes before resubmitting the rule. Previous versions of the APA specifically did permit modifications, and the current Act recognizes the authority of an agency to make changes following a public hearing. The Court pointed out that, since the Act allows an agency to withdraw a rule that has been submitted to JCAR and then resubmit it, that provision would have very little meaning if the agency could not make changes before resubmitting the rule, especially if the rule were objectionable for one of the reasons listed in the APA. The Court stated, "Within the context of the potential threat of a notice of objection from JCAR, it makes little sense that an agency cannot withdraw a proposed rule, make requisite changes, so long as those changes are within the regulatory impact and small business impact statements, and resubmit the proposed rule."

Opposing Argument

The existing procedures already generate many complaints, especially from businesses, about how long the rule-making process can take. Reportedly, until recently, the process averaged 500 days. The bill would exacerbate this problem. If JCAR decided to introduce legislation on the subject of a proposed rule, the rule could not be adopted for one year after bills were introduced. Since legislators already may introduce bills as they see fit, including bills on the subject of a proposed rule, the key difference would be the one-year delay. In addition, it is not clear how the one-year delay would work if bills were introduced during the second year of a two-year legislative session.

If JCAR proposed that an agency change a rule, as the bill would allow, it would add yet another phase to the process. The OPT would have to make a determination about the burden of the changed rule on small businesses, and the agency could be required to prepare a new regulatory impact statement and hold another hearing. The changed rule then would be resubmitted to JCAR, which could take the same actions allowed for the original rule, leading to a potentially endless cycle. If unlimited delays prevented rules from being adopted, there could be a separation of powers issue.

Under the current process, legislators already may have input on a proposed rule before it is transmitted to JCAR. Like members of the public, they can testify at the public hearing on the rule and present their own and their constituents' concerns. The JCAR hearing also gives legislators an opportunity to provide input. If an agency proceeds to adopt a rule despite concerns raised by members of JCAR or other legislators, legislation can amend the enabling statute under which the rule was adopted.

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.