



Senate Fiscal Agency
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Senate Bill 938 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Tom Barrett
Senate Committee: Oversight

Date Completed: 11-1-22

RATIONALE

Michigan has thousands of administrative rules that are promulgated to carry out State law. However, some of these rules are decades old and have not been reviewed since 2011. Some people contend that administrative rules ought to be reviewed regularly to ensure that they are still effective and necessary. Accordingly, it has been suggested that a rule review process be established that would require State agencies to regularly review their promulgated rules and submit a report detailing the rules they reviewed.

CONTENT

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

- **Require, by January 31, 2024, and biennially after that, each agency that had promulgated rules to select for review 25% of rules then in effect and to submit a list of the selected rules to the Michigan Office of Administrative Hearings and Rules (MOAHR).**
- **Require the MOAHR to publish in the Michigan Register a rule review list that included specified information regarding the rules being reviewed.**
- **Require each agency to review each rule at least once every eight years.**
- **Require each agency to prepare and submit a rule report with specified information concerning each rule and require the report to be made available on the agency's website and provided to specified entities.**
- **Require the Joint Committee on Administrative Rules (JCAR) to provide a copy of the rule report to JCAR members by the next business day after receiving it.**
- **Allow JCAR to decide to allow a missing rule to remain in effect.**
- **Allow a missing rule to be rescinded if JCAR did not allow the rule to remain in effect and if the agency that submitted the original rule report failed to submit a new report within 14 days of the Michigan Register's publication containing the notice of deficient report.**
- **Require the Auditor General to conduct a performance audit of, and to provide a performance report on, any rule report submitted to it, beginning July 31, 2026, and biennially after that.**

Rule Review List

The bill would require, by January 31, 2024, and biennially after that, each agency that had promulgated rules or that was the successor to an agency that had done so to select for review 25% of those rules then in effect and submit a list of those rules to the MOAHR. Each rule would have to be reviewed at least once every eight years.

Using the lists, the MOAHR would have to publish a rule review list in the Michigan Register. The rule review list would have to include all of the following:

- All the rules being reviewed.
- A statement that a person could submit to the relevant agency any comments concerning the rule within 60 days after the publication of the rule review list.
- The address to which written comment could be sent and the date by which comments would have to be submitted.

Each comment filed would have to contain the name of the person submitting the comment, the specification of the rule or rules being commented on, and any views or arguments regarding the rule or rules being commented on. The comments would have to be submitted to the appropriate agency.

Rule Review Report

By July 31 in the year following the year the rule review list was published in the Michigan Register, each agency would have to prepare and submit a rule report that contained all of the following information:

- Whether each rule was necessary, outdated, or duplicative.
- Whether a less restrictive, more narrowly tailored, or alternative rule could accomplish the same purpose.
- Whether each rule needed to be updated or rescinded.
- The fiscal impact of each rule on the relevant agency.
- The fiscal impact of each rule on businesses and individuals, including whether the rule had a disproportionate impact on businesses of a certain size, within a certain industry, or in a certain geographic area or areas of Michigan.
- The fiscal impact of the rule on local governments.
- A list of the comments received and the agency's response to each comment.
- Whether the Legislature explicitly delegated statutory authority for promulgating the rule, and if so, whether the delegation was general or specific and mandatory or permissive.

The rule report would have to be made available on the agency's website and provided to all of the following:

- The Joint Committee on Administrative Rules.
- The Governor.
- The standing committees of the Senate and House of Representatives with primary responsibility for issues pertaining to the agency.
- The Auditor General.
- The Senate and the House Appropriations Committees.
- The appropriations subcommittees with primary responsibility for issues pertaining to the agency.

Failure to Include Rule Subject to Review

After receiving the rule report, JCAR would have 21 session days in which to consider the rule report and determine if the report contained a missing rule. If JCAR decided that a rule report contained a missing rule, JCAR would have six session days to decide to allow the missing rule to remain in effect. If a first vote to allow the missing rule to remain in effect failed, JCAR could reconsider the vote within the six session days. Any action taken by JCAR would have to be made by a concurrent majority vote.

"Missing rule" would mean a rule that was subject to review and included on the rule review list but not included in the rule report. "Session day" would mean a day in which both the House of Representatives and the Senate convened in session and a quorum was recorded.

Also, if JCAR decided that a rule report contained a missing rule, within six session days, JCAR would have to notify the agency that submitted the rule report, the MOAHR, and the Secretary of

State (SOS). The notice would have to contain a list of all the missing rules and any missing rules that JCAR decided could remain in effect.

The MOAHR would publish the notice in the next edition of the Michigan Register that was published after the notice was received. Within 14 days after the notice was published, the agency that submitted the rule report would be required to submit a new report that included any missing rules that JCAR did not decide to allow to remain in effect. If JCAR decided to allow a missing rule to remain in effect, the agency would not have to include that missing rule in the new rule report.

If the agency failed to submit a new report, any missing rule that was not included in the report and was not allowed to remain in effect would be automatically rescinded. The MOAHR would have to notify the SOS of any rule that was rescinded.

Role of Auditor General

By July 31, 2026, and biennially thereafter, the Auditor General would have to conduct a performance audit of, and provide a performance report on, any rule report submitted. The performance report would have to be provided to the Governor, the leadership of the Senate and House, JCAR, all standing committees, and the Senate and House Appropriations Committees, and the public by posting the report on the Auditor General's website. The performance report would have to contain all of the following information:

- Whether the department reviewed all required rules.
- Whether the department's findings regarding statutory delegation of authority on each rule were correct.
- Whether the department's rescission of duplicative, outdated, or unnecessary rules was timely.
- Whether the department completed a performance audit on the impact of the rules on business.
- Any other relevant information to help the Legislature determine whether the regulatory review process was working efficiently and effectively.

Michigan Register

The MOAHR must publish the Michigan Register at least once each month. The Michigan Register must include the items specified in the Act, including, e.g., executive orders and executive reorganization orders, proposed administrative rules, and administrative rules filed with the SOS. The bill also would require that the Michigan Register include the rule review list and notice of deficient report described in the bill.

MCL 24.208 et al.

BACKGROUND

The Administrative Procedures Act

The Administrative Procedures Act (APA) establishes a process for promulgating State agency rules. According to the APA, a rule is an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency. Michigan has thousands of rules that are promulgated by State agencies to carry out State law. The APA also created JCAR. The Joint Committee on Administrative Rules consists of five members from the Senate and five members from the House of Representatives and is responsible for legislative oversight of administrative rules proposed or promulgated by State agencies. The Joint Committee may meet to consider proposed rules, take testimony, and provide State agencies with an informal response to a rule before the final rule package is submitted for review. After receiving a final rule package, JCAR may stop or delay a rule from becoming law. In addition, JCAR also may hold a hearing on any rule previously filed with the Secretary of State.

The Michigan Office of Administrative Hearings and Rules

The Michigan Office of Administrative Hearings and Rules, created by Executive Order (EO) 2019-06, is a State agency within the Department of Licensing and Regulatory Affairs (LARA). The Director of LARA appoints the Executive Director of the MOAHR, who is the State's chief regulatory officer. While situated within LARA, the MOAHR is a Type I agency, which means that it exercises its powers and otherwise operates independently of LARA. The purpose of the MOAHR is to conduct administrative hearings and to aid in the promulgation of rules.

Rulemaking Process

A State agency that proposes a new rule must submit a request for rulemaking to the MOAHR for approval to begin the rulemaking process. The agency then must draft the proposed rule and submit the proposal to the MOAHR for approval. The agency must also prepare a regulatory impact statement, which must be submitted to the MOAHR at least 28 days before the public hearing. A regulatory impact statement includes an examination of roughly 30 different factors, including a number of factors that examine how the rule would affect small businesses (i.e., a small business impact statement). The State agency must hold a public hearing, with notice published between 10 and 60 days in advance of the meeting. After the public hearing, the agency must submit the proposed rules to JCAR within one year.

The final rule package submitted to JCAR must contain a transmittal letter, the final version of the proposed rules, a report summarizing the rules and the public hearing, a Legislative Service Bureau certification, an MOAHR certification, the request for rulemaking, and the regulatory impact statement. After receiving this package, JCAR has 15 session days to act. If JCAR does not stop or delay the proposed rules, the proposed rules may be filed with the Secretary of State and it becomes law.

Previous Systematic Rule Review

Executive Order 2011-5 created the Office of Regulatory Reinvention (ORR) and required it to complete a systematic review of all then-existing and proposed rules. In its review, the ORR had to consider at least all of the following factors: 1) the health or safety benefits of the rules; 2) whether the rules were mandated by any applicable constitutional or statutory provision; 3) the cost of compliance with the rules; 4) the extent to which the rules conflicted with or duplicated similar State or Federal rules or regulations; 5) the extent to which the rules exceeded national or regional compliance requirements or other standards; 6) the date the rules were last evaluated and the degree, if any, to which technology, economic conditions or other factors had changed regulatory activity covered by the rules since the last evaluation; 7) other changes or developments since implementation that demonstrated there was no continued need for the rules; 8) the recommendations of Advisory Rules Committees formed under EO 2011-5; 9) the recommendations of any departments or agencies that were charged with the implementation or enforcement of the rules; 10) public comments; 11) the nature of any complaints or comments the ORR or any department or agency received from the public concerning the rules; and 12) other factors the ORR considered necessary or appropriate.

The ORR reviewed and evaluated all promulgated and proposed rules and submitted a series of reports to the Governor with relevant recommendations. In addition to this rule review process, the ORR also directed additional, targeted reviews of selected rule areas and submitted additional findings and recommendations to the Governor. The review resulted in a number of legislative changes, and a substantial number of administrative rules were eliminated.¹

¹ The SFA was not able to determine the final number of rules eliminated; however, according to a LARA press release, as of October 13, 2013, over 1,000 of the State's rules were eliminated during that review.

Executive Order 2016-4 transferred all powers and duties from the ORR to the Office of Performance and Transformation (OPT) and abolished the ORR. Then, EO 2019-6 transferred the powers and duties of the OPT to the MOAHR. Currently, the MOAHR and JCAR are the two State entities that administer the rulemaking process and there has no systemic review of rules since EO 2011-5.

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

State agencies are not the elected representatives of the people. Most rules promulgated by these agencies are necessary to carry out laws the Legislature enacts. However, other rules are no longer relevant. Often, rules made decades ago are seldom reviewed and continue to exist without serving their original purpose. A formal rule review process would confirm whether rules promulgated by State agencies were still needed to carry out the law, and that there was not a less restrictive rule that could accomplish the same purpose. Furthermore, by allowing JCAR to decide if a report contained a missing rule, and whether that rule should remain in effect, elected legislators would be more involved in the rule review process. Moreover, a review process would limit how much State agencies could regulate the people of the State.

Opposing Argument

While unnecessary and duplicative rules exist, a formal rule review process would add more bureaucracy to State government when the intent is to minimize regulation. Instead, the Legislature or State agencies should be able to pick out specific rules to be reviewed to avoid unnecessary work.

State agencies promulgate administrative rules to ensure best and safe practices for Michigan residents. If the rule review process were enacted, rules that appeared outdated or unnecessary could be removed even if they protected residents or the environment. Sometimes, the only things that prevents an individual or entity from engaging in a dangerous or unsafe practice (or failing to maintain a practice that protects individuals, entities, or the environment) is an administrative rule that prohibits (or requires) that practice and a penalty that discourages violation of the rule. Consequently, a rule's elimination could bring about the harm it was promulgated to prevent. Generally, the rules that exist are necessary, and a rule review process could open up the possibility of eliminating necessary regulations that protect individuals and entities in Michigan.

Response: The purpose of the rule review process would be to eliminate duplicative or obsolete rules that were promulgated decades ago, not to remove rules that actively protect individuals, entities, or the environment. The rule review process would maintain necessary rules and only eliminate ones that no longer served the community.

Legislative Analyst: Olivia Ponte

FISCAL IMPACT

The bill could have a negative fiscal impact on State government. Depending on the number of administrative rules to be reviewed, which vary by department, there could be increased administrative costs (of varying magnitude) associated with fulfilling the requirements prescribed by the bill. The exact cost for the bill per department is indeterminate and would depend on the number of rules each department would have to review. The MOAHR would see a cost increase that would depend upon the number of rules ultimately reviewed.

Fiscal Analyst: Jonah Houtz

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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.