Issue Paper

PAPERS EXAMINING CRITICAL ISSUES
FACING THE MICHIGAN LEGISLATURE

Senate Fiscal Agency

THE EVOLVING ROLE OF THE JOINT COMMITTEE ON ADMINISTRATIVE RULES

by

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August 2016

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ACKNOWLEDGMENTS

The author thanks Marge Martin, Michigan Law Compiler for the Legislative Service Bureau and legal counsel to the Joint Committee on Administrative Rules, for her review of this paper before its publication. Thanks also are extended to Haley Vanderstelt, Senate Fiscal Agency Unit Assistant and Office Administrator, for her assistance in finalizing this paper.

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INTRODUCTION

Most members of the public might not be aware of or familiar with administrative rules, but rules adopted by State agencies can have a direct impact on individuals' daily lives or occupations, or on businesses' operations. Rules address virtually any subject that may be regulated by law, ranging from such matters as the licensure of riding stables, standards for the sale of honey, the construction of dog kennels, open burning, and elevator operations, to pesticide application, consumer advertising, mortgage lending practices, youth employment standards, occupational licensing and registration, and taxpayer audits. Administrative rules essentially spell out how an agency (a State department or division of a department) will implement or apply laws that it is required to enforce. Administrative rules have the force and effect of law, and they are adopted, or "promulgated", according to specific statutory procedures that provide due process protections.[1]

Michigan's administrative rule-making process is governed by Chapter 3 of the Administrative Procedures Act (APA) of 1969 (MCL 24.231-24.264). The process begins when an agency submits a request for rule-making to an entity in the executive branch called the Office of Performance and Transformation (OPT), and concludes when the OPT files the rule with the Secretary of State.[2] 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).

This issue paper concerns the role of the Legislature and JCAR in the rule-making process. The Joint Committee on Administrative Rules consists of five members of the Senate and five members of the House of Representatives, appointed for two-year terms in the same manner as members of standing committees are appointed.[3] From each house, three members must be from the majority party and two from the minority party. The JCAR chairperson alternates between the House and the Senate each year. Action by the Committee must be by concurring majorities of the members from each house.

As a result of legislation and litigation, JCAR's role has expanded and contracted significantly in the nearly half-century since the APA was enacted in 1969. Originally, JCAR had a relatively minor role in the rule-making process, without authority to approve or object to proposed rules. After amendments to the APA in the 1970s authorized JCAR to disapprove rules, and essentially made all rules dependent on legislative approval, the Michigan Court of Appeals and the Michigan Supreme Court found that JCAR's authority was unconstitutional. Legislation enacted in 1999 established a more limited role for JCAR, which may object to rules and introduce legislation to prevent a rule from taking effect or to delay its effectiveness; however, the Committee cannot otherwise reject rules. Some people now believe that JCAR's role has been overly restricted, leaving the Committee unable to respond adequately to the public's concerns.

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[1] According to a Michigan Supreme Court opinion, "Without doubt, these procedural requirements provide extensive due process safeguards to those persons affected by the agency's rule-making." *Westervelt v. Natural Resources Commission* (402 Mich 412).

[2] The APA defines "agency" as a State department, bureau, division, section, board, commission, trustee, authority, or officer, created by the Constitution, statute, or agency action; the term does not include an agency in the legislative or judicial branch.

[3] Originally, JCAR consisted of three members of the Senate and five members of the House. Public Act 243 of 1978 increased the Senate members to the current five.

This issue paper provides an overview of the rule-making process, discusses how JCAR's role in the process has evolved since 1969 as a result of legislative amendments and judicial decisions, and describes a current legislative proposal to expand the actions JCAR may take when a rule is proposed, as well as other proposals that would change the process.

It should first be noted that two aspects of the Legislature's and JCAR's role have remained constant since 1969, although the applicable statutory language has varied. First, Section 51 of the APA has always authorized JCAR, an appropriate standing committee, or a member of the Legislature to introduce a bill that in effect amends or rescinds a rule that JCAR, the standing committee, or the member believes is unauthorized, is not within legislative intent, or is inexpedient. In addition, Article IX, Section 37 of the State Constitution specifies that the Legislature may empower a joint committee of the Legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency after the adjournment of the preceding session. This authority has been reflected in Section 52 of the APA since it was enacted.

BACKGROUND

Administrative rules have been part of Michigan history since the early days of statehood, and Michigan's first Administrative Procedures Act was enacted by Public Act 88 of 1943.[4] That version of the statute was repealed and replaced by the APA enacted in 1969.[5]

Administrative rules are part of Michigan's body of law, along with statutes enacted by the Legislature, judicial decisions (case law), and common law. Members of the public must comply with administrative rules just as they must obey statutory law. In fact, a violation of a rule may be punishable as a criminal offense, if a statute provides that a violation is a crime. A rule itself, however, cannot make something a crime or prescribe a criminal penalty for a violation of the rule.

Agencies may not adopt rules without statutory authority to do so, and a rule "may not exceed the rule-making delegation contained in the statute authorizing the rule-making" (MCL 24.232(7)).[6] Often, a statute that creates a new program, and requires a particular State department to administer it, also requires the department to promulgate rules to implement the act or specific provisions of it. A statute also might require a department or agency to promulgate rules that establish qualifications, criteria, or standards for various purposes. In other cases, a statute will permit a department or agency to promulgate rules.

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[4] "*Blank v. Department of Corrections:* Milliken's Revenge", Michael J. Zimmer, Administrative Law Quarterly, Summer 1997.

[5] The APA not only provides for the rule-making process but also governs the issuance of guidelines by agencies, contested cases (proceedings in which agencies make a decision as to the legal rights of a party after an evidentiary hearing), and judicial review of agency decisions.

[6] The general rule in Michigan is that the power and authority of an agency must be conferred by explicit statutory language. Court have indicated, however, that agencies may gain rule-making power through statutory implication, but only when that authority is "necessary to the due and efficient exercise of the powers expressly granted" by the enabling statute. *Herrick District Library v. Library of Michigan* (293 Mich App 571), quoting *Ranke v. Corporation and Securities Commission* (317 Mich 304).

ADMINISTRATIVE RULES

Whether the APA's rule-making requirements apply depends on whether an agency is promulgating a "rule". This determination is significant because, if an agency issues a policy, ruling, or other determination that is actually a rule, without following the procedures of Chapter 3 of the APA, the rule will be invalid and will not have the force and effect of law.[7]

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 (MCL 24.207). The definition identifies a number of items that the term does *not* include, such as an intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public; an interpretive statement, informational pamphlet, or other material that itself does not have the force and effect of law but is merely explanatory; a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected; and a declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.[8]

A rule also must be distinguished from a "guideline", which is an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person. Chapter 2 of the APA sets out a separate process for the adoption of a guideline, and prohibits an agency from adopting a guideline in lieu of a rule.

OVERVIEW OF THE RULE-MAKING PROCESS

Under Chapter 3 of the APA, the rule-making process begins when an agency submits a request for rule-making to the Office of Performance and Transformation (OPT).[9] If the OPT approves the request, the agency drafts the rule and submits it 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

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[7] This has been the holding of a number of Michigan Supreme Court and Court of Appeals decisions, e.g., *Goins v. Greenfield Jeep Eagle, Inc.* (449 Mich 1) and *Smith v. Department of Human Services* (297 Mich App 148).

[8] Whether the action of an agency falls under any of the exclusions may be the subject of litigation. In *Faircloth v. Family Independence Agency*, for example, the Court of Appeals addressed a challenge to a policy of the former Department of Social Services regarding eligibility for disability assistance. The plaintiffs claimed that the policy was invalid because it had not been promulgated as a rule, but the Court held that the policy was an interpretive statement that did not have to be promulgated as a rule (232 Mich App 391). Also, in *By Lo Oil Co. v. Department of Treasury*, the Court of Appeals held that a Revenue Administrative Bulletin issued by the Department was not required to be promulgated as a rule (267 Mich App 19).

[9] 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.

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, the rule is transmitted to the Legislative Service Bureau, which must certify the rule for form, classification, and arrangement, and the OPT must submit a final draft of the rule to JCAR. As discussed in more detail below, JCAR 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.

Exceptions to this process apply to emergency rules, which may be adopted when the preservation of the public health, safety, or welfare is at stake. Additional exceptions apply to Michigan Occupational Safety and Health Act rules that are substantially similar to Federal rules. These and various other exceptions are not relevant to this paper.

PREVIOUS ROLES OF JCAR

The original Administrative Procedures Act enacted in 1943 made no reference to a legislative role in the rule-making process, although a 1947 amendment "established the legislature as a pervasive force in administrative rule making".[10] Subsequently, amendments were enacted and several Attorneys General ruled that provisions concerning the Legislature's role were unconstitutional.[11] Public Act 306 of 1969 then repealed the 1943 statute and recodified the Administrative Procedures Act. This paper focuses on the role of JCAR under the newer statute.

The Administrative Procedures Act of 1969 created (or recreated) the Joint Committee on Administrative Rules; authorized JCAR to prescribe procedures for the drafting, processing, publication, and distribution of rules; required an agency proposing a rule to notify JCAR; and permitted JCAR 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.

In addition, the APA provided that, if authorized by concurrent resolution of the Legislature, JCAR could, between regular sessions, suspend a rule or part of a rule promulgated during the interim between sessions. The rule would be suspended until the next regular session. (As noted above, these provisions remain in the current version of the APA, and reflect authority granted in Article IV, Section 37 of the State Constitution of 1963.)

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

[10] See note 4.
[11] See note 4.

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).

BLANK v. DEPARTMENT OF CORRECTIONS

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 Court of Appeals held that the legislative approval requirements of Sections 45 and 46 of the APA were unconstitutional. (Section 45 contained the requirements for a rule to be approved by JCAR or adopted by the Legislature, and Section 46 prohibited an agency from filing a rule absent that approval or adoption.) 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 severed Sections 45 and 46 from the APA, but pointed out, "The Legislature may still revoke or suspend a rule through the use of a bill passed by a majority of both houses and presented to the Governor…". The Court also 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).

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 decision consisted of an opinion of three justices, referred to as the "lead opinion", one opinion that concurred in the holding and result of the lead opinion, one opinion concurring in the result of the lead opinion, and a dissenting opinion.) The Court (the lead opinion) first stated, "The Legislature's statutory delegation of authority to executive branch agencies to adopt rules and regulations consistent with the purpose of the statute does not violate the separation of powers provision." The issue, then, was "whether the Legislature, upon delegating such authority, may retain the right to approve or disapprove rules proposed by executive branch agencies."

Essentially, the Court held that the Legislature could not do so without complying with the Constitution's enactment and presentment requirements.

According to the Court, "[T]he action of JCAR or the Legislature in exercising the authority granted by §§ 45 and 46 of the APA is inherently legislative." The Court based this conclusion on the following points: "First, if JCAR or the Legislature can block the implementation of DOC rules, it has the power to alter the rights, duties, and relations of parties outside the legislative branch…Second, JCAR's failure to approve the rules promulgated by DOC involves policy determinations…[which] are fundamentally a legislative function…Third, JCAR's action in failing to approve the rules proposed by DOC is inherently legislative in nature, because it supplants other legislative methods for reaching the same result."

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."

The Court severed from the APA the portions of Sections 45 and 46 that it found to be unconstitutional, and provided that the remaining portions would continue in effect. The Court also found that the enabling act that authorized the Department of Corrections to promulgate rules was not an unconstitutional delegation of legislative power, and that the rules promulgated by the DOC did not exceed the scope of authority delegated to it.

(Both the Court of Appeals and the Michigan Supreme Court indicated that they were addressing the constitutionality of the rule-making process that the Supreme Court had declined to address in 1977. Section 45 had been amended nine times, however, since the 1977 amendments were enacted. The version of Section 45 that was before the Courts had been most recently amended in 1993. The language of that section is contained in Appendix A to this article.)

REVISED ROLE OF JCAR

On April 1, 2000, shortly before the Supreme Court decision in *Blank* was issued, Public Act 262 of 1999 took effect. This legislation amended the APA to revise the rule promulgation process, including the role of JCAR and the Legislature. Between March 21, 1997, when the Michigan Court of Appeals issued its decision in *Blank*, and April 1, 2000, proposed rules still were submitted to JCAR for its consideration, but approval of the Committee or the Legislature was no longer required for the rules to take effect. Public Act 262, then, restored a role for JCAR that was more substantive than mere consideration but significantly narrower than the authority found to be unconstitutional.

Under Section 45a, added by Public Act 262, after receiving a letter of transmittal from the Office of Regulatory Reform (ORR), JCAR was given 21 calendar days to consider a proposed rule and object to it by filing a notice of objection approved by a concurrent majority of the Committee members. The Committee could approve a notice of objection only on grounds specified in the Act (e.g., the agency lacked statutory authority for the rule, the rule conflicted with State law, the rule was arbitrary or capricious, or the rule was unduly burdensome to the public or to a licensee). If JCAR did not file a notice of objection within the 21-day period, the ORR could file the rule immediately with the Secretary of State. If JCAR did file a notice of objection, the Committee chairperson, the alternate chairperson, or a Committee member had to have bills introduced in the House and the Senate to 1) rescind the rule on its effective date; 2) repeal the statutory

provision under which the rule was authorized; or 3) stay the rule's effective date for up to one year.

If filed, the notice of objection prevented the ORR from filing the rule for 21 calendar days (except as otherwise provided for periods the Legislature was not in session). If the legislation was defeated in either house and the vote was not reconsidered, or if the legislation was not adopted by both houses within the specified time period, the ORR could file the rule with the Secretary of State. If the legislation was enacted and presented to the Governor within the 21-day period, the rule could not take effect unless the Governor vetoed the legislation.

Section 45a also included provisions allowing an agency to withdraw and resubmit a proposed rule with or without permission of the chairperson and alternate chairperson of JCAR. If permission was granted, the 21-calendar-day time period was tolled until the rule was resubmitted, although JCAR had to have at least seven calendar days to consider the rule. If permission was not granted, a new 21-day period began when the rule was resubmitted.

The present version of Section 45a closely resembles the language enacted in 1999, although a number of amendments have been enacted in the interim. In particular, 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. That change also is reflected in the provisions that allow an agency to withdraw and resubmit a rule.

In addition, Public Act 491 retained the language in Section 51 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. (According to the Court of Appeals in *Blank*, "[B]ecause a concurrent resolution does not have the force and effect of law, such a legislative disapproval would have no legal effect on the rule…".)

MICHIGAN CHARITABLE GAMING ASSOCIATION v. STATE OF MICHIGAN

In an opinion dated May 28, 2015, the Michigan Court of Appeals again addressed the rule-making process, in *Michigan Charitable Gaming Association v. State of Michigan* (310 Mich App 584). The opinion is relevant to this paper because the Court recognized the extent to which the role of JCAR had been limited.

The appeal involved administrative rules promulgated by the Michigan Gaming Control Board to provide for stricter regulation of millionaire parties (a form of casino-style charitable gaming), and the issue before the Court involved the ability of an agency to withdraw rules and resubmit them to JCAR with changes. In this case, after JCAR held a hearing, the Committee chairperson suggested that the rules be withdrawn so changes could be made to address concerns raised by members of the public, which is what occurred. After the rules were resubmitted with revisions, and JCAR did not object, the rules were submitted to the Secretary of State and took effect.

The rules then were challenged in the Court of Claims on the ground that the APA did not permit an agency to revise rules after they were withdrawn. The plaintiffs also claimed that the agency violated the Act because it failed to hold a public hearing on the new rules or to issue a new regulatory impact statement or small business impact statement. The Court of Claims agreed with the plaintiffs, holding that the promulgated rules were invalid. Although an agency may make

changes in proposed rules at earlier stages in the process, the Court of Claims interpreted the Act as allowing a rule to be withdrawn and resubmitted to JCAR only without changes. This conclusion was supported by the fact that a former version of the APA had expressly permitted rules to be resubmitted with changes or minor modifications; Public Act 262 of 1999 replaced that provision with the current language.

The Court of Appeals reversed, and the Michigan Supreme Court denied leave to appeal. According to the Court of Appeals, nothing in the APA prohibits an agency from withdrawing a rule, making changes, "so long as those changes are within the regulatory impact and small business impact statements", and resubmitting the rule as changed to JCAR. The Court also held that an additional public hearing is not necessary.

In addition, the Court commented on the role of the Committee, stating: "JCAR had far more authority under the previous statutory scheme…". The Court described several ways in which JCAR had broader authority in the past, and stated, "This is in contrast to the current statutory scheme, in which the promulgating agency has authority to make changes to proposed rules after public hearing…, and 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…Indeed, we believe that the effect of the current versions of §§ 45 and 45a is to shift authority toward the agency and away from JCAR."

The Court did not, however, express an opinion as to whether the role of JCAR had been unduly limited. Furthermore, it should be noted that the "previous statutory scheme" involved the provisions that the Michigan Supreme Court had found unconstitutional in *Blank*.

PROPOSED LEGISLATION

Several proposals introduced during the current legislative session would affect the role of JCAR. These bills are discussed below.

Senate Bill 962

Senate Bill 962, sponsored by Senator Jim Stamas, would address concerns that JCAR's role has been overly diminished. On June 9, 2016, this bill was reported from the Senate Oversight Committee.[12] Under the bill, after receiving notice of a proposed rule, JCAR would be authorized to 1) object to the rule (as presently allowed); 2) propose that the rule be changed, or 3) decide to introduce bills to enact the subject of the rule (which would not have to contain the same language as the rule). As current law allows, the Committee would have 15 session days to take these actions.

If JCAR proposed to change a rule, the agency proposing it would be required either to change the rule and resubmit it to the Committee, or to notify JCAR of its decision not to change the rule. If the agency decided to change the rule, the Office of Performance and Transformation would have to determine whether the regulatory impact or the impact on small businesses of the changed rule would be more burdensome than the impact of the rule originally proposed. If the OPT determined that the changed rule would be more burdensome, the agency would have to

[12] A detailed description of the version of the bill reported from committee can be found in the Senate Fiscal Agency analysis of Senate Bill 969 (S-1) at the following site: http://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0962-A.pdf

prepare a new agency report (containing a regulatory impact statement and other specified information) and hold a new public hearing.

If JCAR decided to introduce bills to enact the subject of a proposed rule, the OPT would not be allowed to file the rule with the Secretary of State until one year after the bills were introduced. Similarly, if the bills were presented to the Governor within one year after being introduced, the rule would not take effect unless the Governor vetoed the legislation.

In addition to expanding JCAR's options when presented with a proposed rule, Senate Bill 962 would authorize an agency to withdraw a rule that is before JCAR and resubmit the rule with changes. This provision would reflect the Court of Appeals ruling in *Michigan Charitable Gaming Association*.

Supporters of the bill believe that it would help restore the balance of power between the legislative and the executive branches in the rule-making process, and enable JCAR to be more responsive to public concerns. Some also suggest that additional scrutiny by the Legislature could alleviate the "avalanche" of rules that are imposed on businesses. Others, however, have raised concerns about the proposal. In testimony before the Senate Oversight Committee, it was pointed out that people already complain about the length of the rule-making process. If JCAR decided to introduce legislation on the subject of a rule, the bill would extend the process by another year. If JCAR proposed that an agency change a rule, a new set of procedures would apply.[13]

House Bills 5672 and 5673

House Bills 5672 and 5673 were introduced on May 19, 2016, and referred to the House Committee on Oversight and Ethics.

House Bill 5672, sponsored by Representative Holly Hughes, would amend Section 45a of the APA to provide that, if JCAR filed notice of an objection to a proposed rule, the Office of Regulatory Reinvention (now the OPT) could not file the rule with the Secretary of State until 1) 30 session days after the notice of objection was filed; 2) the date JCAR rescinded the notice of objection; 3) one year after the date the notice of objection was filed, if a concurrent majority of JCAR voted in favor of this option; or 4) two years after the date a majority of the members of the House and the Senate approved a resolution staying the effective date of the rule.

House Bill 5673, sponsored by Representative Ken Goike, would establish a process under which an agency could promulgate a rule without holding a public hearing or preparing a regulatory impact statement. Specifically, if an agency determined that a public hearing and an impact statement were unnecessary, the agency could include in its request for rule-making a recommendation that promulgation of the rule be expedited. The OPT then would have to determine whether promulgation should be expedited. If the OPT determined that it should be, the chairperson or alternate chairperson of JCAR could object to expedited promulgation. If that occurred, the agency could not proceed without holding a public hearing and preparing a regulatory impact statement. If the OPT did not determine that promulgation of a rule should not be expedited, or the JCAR chairperson or alternate chairperson did not object to expedited promulgation, the agency could proceed with processing the rule without holding a public hearing and preparing a regulatory impact statement, and would have to notify JCAR after it completed processing the rule.

[13] These and other concerns are discussed in the Senate Fiscal Analysis of the bill, cited in note 12.

House Bill 5673 also would change the 15-session-day period that JCAR has to object to a proposed rule that is transmitted to the Committee. Unless the rule were being expedited, JCAR would have 21 session days to object. If the rule were being expedited, the period would be nine session days after the Committee received notice that the agency had completed processing without holding a public hearing or preparing a regulatory impact statement.

In addition, House Bill 5673 would limit the ability of an agency to make changes to a proposed rule after holding a public hearing on it, limit the grounds on which a rule could be challenged after publication in the *Michigan Register* or the Michigan Administrative Code, and make various other amendments.

CONCLUSION

The current language of Section 45a, which establishes the present role of JCAR, is contained in Appendix B.[14] A comparison of Section 45a to the version of Section 45 that the Court of Appeals and Supreme Court considered in *Blank*, in Appendix A, shows a definite curtailment of the Committee's functions. Whether JCAR's role has been excessively reduced and should be expanded is a decision for lawmakers and, perhaps ultimately, the courts.

It is not possible to predict whether any of the bills described above will be enacted, in either its current form or with amendments. Before the present legislative session adjourns at the end of 2016, there is ample opportunity for the Legislature to act on these bills or to introduce and take up other legislation to revise the administrative rule-making process.

Considering the nature of that process, any revision to the roles of the executive and legislative branches has the potential to raise separation of powers concerns. Proposals to bolster the Legislature's role should be sensitive to the decision of the Michigan Supreme Court in *Blank v. Department of Corrections*, which demonstrated that the Court will strike provisions of the law that do not conform to the State Constitution.

Finally, any proposals to amend the rule-making process should be mindful of the purpose of statute. According to the Court of Appeals, in *Michigan Charitable Gaming Association*, "The Legislature's intent in enacting the 'elaborate procedure for rule promulgation' was to 'invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules and make the rules readily accessible after adoption.'"

[14] The current language does not reflect the creation of the Office of Performance and Transformation and continues to refer to its predecessor, the Office of Regulatory Reinvention.

APPENDIX A

Section 45 of the Administrative Procedures Act
As amended by Public Act 141 of 1993

[Subsections (1) through (5) omitted]

(6) After receipt by the committee of the agency's letter of transmittal, the committee has 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular rule by 1 month to a total of not longer than 3 months…

[Subsection (7) omitted]

(8) If the committee approves the proposed rule within the time period provided by subsection (6), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.

(9) If, within the time period provided by subsection (6), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.
(b) The committee subsequently approves the rule.

(10) If the time permitted by this section expires and the committee has not taken action under either subsection (8) or (9), then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses of the legislature simultaneously. Each house of the legislature shall place the concurrent resolution directly on its calendar. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution requires a majority of the members elected to and serving in each house of the legislature.
(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.

[Subsection (11) omitted]

(12) If the committee approves the proposed rule within the time provided by subsection (6), or the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule pursuant to any applicable statute and make a record of the adoption…

[Subsection 13 omitted]

APPENDIX B

Section 45a of the Administrative Procedures Act
Present Version

(1) Except as otherwise provided…, after the committee has received the notice of transmittal…, the committee has 15 session days in which to consider the rule and to object to the rule by filing a notice of objection approved by a concurrent majority of the committee members or the committee may, by concurrent resolution, waive the remaining session days. If the committee waives the remaining session days, the clerk of the committee shall promptly notify the office of regulatory reinvention of the waiver by electronic transmission. The committee may only approve a notice of objection if the committee affirmatively determines by a concurrent majority that 1 or more of the following conditions exist:

(a) The agency lacks statutory authority for the rule.
(b) The agency is exceeding the statutory scope of its rule-making authority.
(c) There exists an emergency relating to the public health, safety, and welfare that would warrant disapproval of the rule.
(d) The rule conflicts with state law.
(e) A substantial change in circumstances has occurred since enactment of the law upon which the proposed rule is based.
(f) The rule is arbitrary or capricious.
(g) The rule is unduly burdensome to the public or to a licensee licensed by the rule.

(2) If the committee does not file a notice of objection within the time period prescribed in subsection (1) or if the committee waives the remaining session days by concurrent majority, the office of regulatory reinvention may immediately file the rule, with the certificate of approval…, with the secretary of state. The rule takes effect immediately upon its filing with the secretary of state unless a later date is indicated within the rule.

(3) If the committee files a notice of objection within the time period prescribed in subsection (1), the committee chair, the alternate chair, or any member of the committee shall cause bills to be introduced in both houses of the legislature simultaneously. Each house shall place the bill or bills directly on its calendar. The bills shall contain 1 or more of the following:

(a) A rescission of the rule upon its effective date.
(b) A repeal of the statutory provision under which the rule was authorized.
(c) A bill staying the effective date of the proposed rule for up to 1 year.

(4) The notice of objection filed under subsection (3) stays the ability of the office of regulatory reinvention to file the rule with the secretary of state until the earlier of the following:

(a) Fifteen session days after the notice of objection is filed under subsection (3).
(b) The date of the rescission of the issuance of the notice of objection, approved by a concurrent majority of the committee members… If the committee rescinds the issuance of a notice of objection under this subsection, the clerk of the committee shall promptly notify the office of regulatory reinvention…

(5) If the legislation introduced under subsection (3) is defeated in either house and if the vote by which the legislation failed to pass is not reconsidered in compliance with the rules of that house, or if legislation introduced under subsection (3) is not adopted by both houses within the

time period specified in subsection (4), the office of regulatory reinvention may file the rule with the secretary of state. The rule takes effect immediately upon its filing with the secretary of state unless a later date is specified within the rule.

(6) If the legislation introduced under subsection (3) is enacted by the legislature and presented to the governor within the 15-session-day period, the rule does not take effect unless the legislation is vetoed by the governor as provided by law. If the governor vetoes the legislation, the office of regulatory reinvention may file the rule with the secretary of state immediately. The rule takes effect 7 days after the date of its filing with the secretary of state unless a later effective date is indicated within the rule.

[Subsections (7) through (10) omitted]