



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 434 (Substitute S-1 as reported)
Senate Bill 435 (as reported without amendment)
Sponsor: Senator Jud Gilbert, II (S.B. 434)
Senator John Pappageorge (S.B. 435)
Committee: Economic Development and Regulatory Reform

Date Completed: 6-15-09

RATIONALE

There is a concern that some administrative rules are unnecessarily burdensome, resulting in a negative impact on regulated industries and economic recovery. An administrative rule is a regulation, standard, policy, or ruling that implements or applies law enforced or administered by a State agency, or prescribes the organization, procedure, or practice of an agency. The Administrative Procedures Act governs the process for State agencies to promulgate rules. An agency must submit a request for rule-making to the State Office of Administrative Hearings and Rules (SOAHR); prepare a regulatory impact statement; reduce a proposed rule's economic impact on small businesses, if the impact would be disproportionate; and hold a public hearing. The Act also requires a rule to be submitted to the legislative Joint Committee on Administrative Rules, and authorizes the Legislature to reject a rule on specific grounds. Once it has been promulgated, an administrative rule has the force of law and is binding on the agency and the public at large.

To address concerns about overregulation, it has been suggested that State administrative rules should not be more stringent than Federal regulations, except with legislative approval; and that agencies should review existing rules periodically as well as take additional steps to reduce a proposed rule's impact on small businesses.

CONTENT

Senate Bill 434 (S-1) would amend the Administrative Procedures Act do the following:

- **Prohibit an agency from promulgating a rule that was more stringent than the applicable Federal standard unless authorized by statute.**
- **Expand an agency's responsibilities in reducing the economic impact of a rule on small businesses.**
- **Require an agency's regulatory impact statement to compare a proposed rule to standards in other Great Lakes states, and include a cost-benefit analysis.**
- **Require a State agency to include a "decision record" of an advisory committee or entity in its rule-making request.**
- **Provide that a rule would not be valid unless it were processed in compliance with requirements regarding rule-making requests, impact on small businesses, and regulatory impact statements.**
- **Allow a person alleging a violation regarding the processing of a rule to bring an action for damages, and allow the court to award up to 10 times the amount of any permit fees plus costs.**
- **Specify that a guideline, operational memorandum, bulletin, or interpretive statement would be merely advisory and could not be given the force and effect of law.**

Senate Bill 435 would amend the Act to:

- **Require agencies and legislative committees to review rules every five years to assess their impact on small businesses.**
- **Require an agency's annual regulatory plan to identify all existing rules and whether they should be continued, changed, or rescinded.**

The bills are described in detail below.

Senate Bill 434 (S-1)

Scope of Rules

Federal Standard. The bill would prohibit an agency from promulgating or adopting a rule more stringent than the applicable Federal standard unless specifically authorized by statute to do otherwise. If an agency adopted rules in order to implement a federally delegated program, it would have to adopt the rules and standards as promulgated or adopted by the Federal government unless a more efficient process were specifically authorized by statute.

Guidelines, Operational Memoranda, Bulletins. The bill states that a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions would be considered merely advisory and could not be given the force and effect of law. An agency could not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions, to support its decision to act or refuse to act if that decision were subject to judicial review. A court could not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions, to uphold such an agency decision.

Order. Under the bill, if a statute allowed an agency to proceed by rule-making or by order and the agency proceeded by order in lieu of rule-making, the order could not be given general applicability to people who were not parties to the proceeding or contested case before the order was issued.

Rule-Making Authority. The bill provides that a rule could not exceed the rule-making delegation contained in the statute authorizing the rule-making.

Rule Violation as Crime. The Act specifies that the violation of a rule is a crime when so provided by statute, and that a rule may not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule. Under the bill, a rule could not designate an act or omission as a crime and could not prescribe a criminal penalty for violation of the rule, unless provided for by statute.

Requests for Rule-Making; Advisory Recommendations

The Act requires an agency, before initiating any changes or additions to rules, to file electronically with SOAHR a request for rule-making in a format prescribed by SOAHR. The request must include the State or Federal statutory or regulatory basis for the rule, the problem the rule intends to address, and an assessment of the significance of the problem. Under the bill, the request also would have to include the decision record, if applicable.

"Decision record" would mean, in regard to a request for rule-making where an agency receives recommendations or comments by an advisory committee or other advisory entity created by law, all of the following:

- The minutes of all meetings related to the request for rule-making.
- The votes of members.
- A summary of the discussion and reasoning in support of the decision.

If an agency received recommendations or comments by an advisory committee or other advisory entity created by law, the committee or entity would have to issue to the agency a decision record regarding any action or discussion regarding the request for rule-making. The decision record would have to be posted on an agency website at least 60 days before the request for rule-making was submitted to SOAHR.

Under the Act, an agency may not proceed with the processing of a rule unless SOAHR has approved the request for rule-making. The bill specifies that SOAHR would not be required to approve a request and could do so only after it had indicated in its response to the request that there were appropriate and necessary policy and legal bases for approving the request.

The Act requires SOAHR to record the receipt of all requests for rule-making on the internet and make electronic or paper copies of approved requests for rule-making available to members of the general public. Under the bill, SOAHR also would have to issue a written or electronic response to a request for rule-making that specifically addressed the issues of whether the request had appropriate and necessary policy and legal bases for approving the request.

Impact on Small Business

Under the Act, when an agency proposes to adopt a rule that will apply to a small business and the rule will have a disproportionate impact on small businesses because of their size, the agency must reduce the economic impact of the rule on small businesses by doing one or more of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

- Establish differing compliance or reporting requirements or timetables for small businesses under the rule.
- Consolidate or simplify the compliance and reporting requirements for small businesses under the rule.
- Establish performance rather than design standards, when appropriate.
- Exempt small businesses from any or all of the rule's requirements.

Under the bill, instead, the agency would have to consider exempting small businesses and, if not exempted, the agency would have to reduce the economic impact of the rule on small businesses by doing all of the following when it was lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:

- Identify and estimate the number of small businesses affected by the proposed rule and its probable effect on small businesses.
- Establish differing compliance or reporting requirements or timetables for small businesses under the rule after projecting the required reporting, record-keeping, and other administrative costs.
- Consolidate, simplify, or eliminate the compliance and reporting requirements for small businesses under the rule and

identify the skills necessary to comply with the reporting requirements.

- Establish performance standards to replace design or operational standards required in the proposed rule.

The small business impact statement would have to address these factors specifically.

Under the Act, if appropriate in reducing a rule's disproportionate economic impact on small business, an agency may use the following classifications of small business:

- 0-9 full-time employees.
- 10-49 full-time employees.
- 50-249 full-time employees.

Under the bill, the agency would be required to use those classifications.

Regulatory Impact Statement

The rule-making process requires SOAHR to transmit by notice of transmittal to the Joint Committee on Administrative Rules copies of a rule and other items. Except for certain rules, the agency must prepare and include a regulatory impact statement with the notice of transmittal. Under the bill, that notice also would have to contain the request for rule-making and the response from SOAHR and a small business impact statement.

The Act specifies the items that a regulatory impact statement must contain, including a comparison of the proposed rule to parallel Federal rules; an identification of the businesses, groups, or individuals who will be directly affected by, bear the cost of, or directly benefit from the rule; an identification of any reasonable alternatives to regulation that would achieve the same or similar goals; estimates of the actual statewide compliance costs of the rule on individuals, businesses, and other groups; and an identification of any disproportionate impact the rule may have on small businesses because of their size.

The regulatory impact statement also must identify the sources the agency relied upon in compiling the statement. Under the bill, this would have to include the methodology used in determining the existence and extent of the impact of the proposed rule and a cost-benefit analysis of it.

The regulatory impact statement also would have to include 1) a comparison of the proposed rule with standards in other states in the Great Lakes region, and a statement of whether the rule exceeded standards in those cases; and 2) a detailed recitation of the agency's efforts to comply with the mandate to reduce the disproportionate impact of the rule upon small businesses.

The bill would require the agency to publish the regulatory impact statement on its website at least 10 days before the date of the public hearing on the rule.

Validity of Rule-Processing

Except in the case of an emergency rule promulgated in the manner described in the Act, a rule is not valid unless processed in compliance with Section 42, which requires the issuance of a notice of public hearing, and in substantial compliance with parts of Section 41 that deal with a public hearing notice and other hearing requirements. Under the bill, a rule would not be valid unless processed in compliance with Section 42 as well as Section 39 (rule-making requests and advisory recommendation), Section 40 (small business impact), and Section 45(3) (regulatory impact statement) (sections that the bill would amend). The bill would retain the requirement of substantial compliance with parts of Section 41.

A proceeding to contest a rule on the ground of noncompliance with the requirements of Sections 41 and 42 must be commenced within two years after the effective date of the rule. Under the bill, that two-year limitation also would apply to proceedings to contest a rule on the ground of noncompliance with Section 39, 40, or 45(3).

Court Actions

Declaratory Judgment. Under the Act, unless an exclusive procedure or remedy is provided by a statute governing an agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. Under the bill, a determination of validity or applicability

could include the failure of an agency to assess accurately the impact of the rule on businesses, including small businesses, in the regulatory impact statement.

An action for declaratory judgment must be filed in the circuit court in the county where the plaintiff lives or has his or her principal place of business or in the Circuit Court for Ingham County, and the agency must be made a party to the action. The bill would delete a provision under which an action for declaratory judgment may not be commenced unless the plaintiff first requests the agency for a declaratory ruling and the agency either denies the request or fails to act upon it expeditiously.

Other Court Actions. Under the bill, a person alleging a violation regarding the processing of a rule could bring an action in the circuit court of the county in which the plaintiff lived or in the Circuit Court for Ingham County for an award of damages. If the court determined that a violation had occurred, it could award up to 10 times the cost of any permit fees as well as the actual and reasonable costs relating to witness and attorney fees.

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Annual Regulatory Review Plan

The Act requires each agency to prepare an annual regulatory plan that reviews the agency's rules. In completing the plan, an agency must identify the rules it reasonably expects to process in the next year, the mandatory statutory rule authority it has not exercised, and the rules it expects to rescind in the next year. The bill would require the plan also to include all existing rules promulgated by the agency and whether those rules should be continued, changed, or rescinded considering their statutory and public policy purpose.

Periodic Review for Effect on Small Business

Under the bill, within five years after the effective date of any new rules promulgated by an agency after the bill's effective date, or within four years after the bill's effective date for rules in effect on that date, an agency and the appropriate standing committees of the Senate and the House of Representatives having jurisdiction over the subject matter would have to review each

set of rules to determine whether there was any increased impact on small businesses since the effective date of those rules.

After the first review of new or existing rules, the agency and the appropriate Senate and House standing committees would have to review rules on the five-year anniversary of the initial review and every five years after that.

The review would have to include all of the following:

- The continued need for the rules.
- The nature of any complaints or comments received from the public concerning the rules.
- The complexity of complying with the rules.
- The extent to which the rules conflicted with or duplicated similar rules or regulations adopted by the Federal government or local units of government.
- The date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors had changed regulatory activity covered by the rules.

MCL 24.203 et al. (S.B. 434)
24.253 (S.B. 435)

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

Michigan's overall regulatory structure has a negative impact on manufacturers, utilities, developers, and other employers. Despite the State's economic crisis, agencies continue to propose and promulgate rules that place increased burdens on job providers. One example is a proposed rule concerning mercury emissions from coal-fired power plants, and another is a potential ergonomics rule that has been widely discussed. Regulations that exceed Federal standards create competitive disadvantages for Michigan, build barriers to economic growth, and ultimately shrink State revenue. Senate Bill 434 (S-1) would take a reasonable approach by limiting administrative rules to Federal standards,

except when elected lawmakers agreed that more stringent regulations were necessary.

The bill also would prevent agencies from promulgating rules inappropriately, and would bring transparency to the rule-making process, by: allowing SOAHR to approve a request for rule-making only if it found appropriate and necessary policy and legal bases for the approval; requiring a request for rule-making to include the agency's "decision record", which the agency would have to post on its website before submitting the request to SOAHR; requiring a regulatory impact statement to describe the methodology used and include a cost-benefit analysis; requiring an agency to publish the statement on its website at least 10 days before a public hearing; and making an agency potentially liable for damages if it violated the Act's rule-making requirements.

In addition, the bill would strengthen accommodations for small businesses that would be disproportionately affected by a proposed rule, by requiring an agency first to consider exempting small businesses and then take steps to reduce the rule's impact on them, if they were not exempted. Also, an agency's regulatory impact statement would have to recite in detail the efforts the agency took to reduce the disproportionate impact on small businesses; and a court, when determining the validity or applicability of a rule, could consider an agency's failure to assess accurately the rule's impact on businesses.

The bill would codify a December 2008 Opinion of the Attorney General (No. 7223), by stating in statute that a guideline, operational memorandum, bulletin, or interpretive statement "is considered merely advisory and shall not be given the force and effect of law", and prohibiting a court from relying on such a document to uphold an agency's decision to act or refuse to act.

Supporting Argument

Senate Bill 435 would help reduce the burden of overregulation by requiring agencies and legislative committees, every five years, to review administrative rules' impact on small businesses, and requiring an agency's annual regulatory plan to identify all existing rules and whether they should be retained, modified, or rescinded. Although a rule might be necessary when it

is first promulgated, and an agency must examine a proposed rule's economic impact during the rule-making process, circumstances can change. Agencies are not currently required to review existing rules periodically or to examine the cumulative impact of rules. A rule that initially was reasonable and fair might become unnecessary or overly burdensome, for example, if less stringent Federal regulations are adopted after the rule's promulgation, or if neighboring states enact more lenient standards, making Michigan uncompetitive. The complexity and cost of compliance might simply be greater than anticipated, as well. Also, a rule that seems appropriate and efficient in isolation might actually be onerous when implemented with other regulations, becoming the last straw for the regulated business. In addition to ensuring that all rules were reviewed periodically, the bill would restore checks and balances by providing for legislative involvement in the process.

Opposing Argument

It would be inappropriate to prohibit rules that were more stringent than Federal standards, except as allowed by statute. These rules protect the public health and safety, as well as the environment. Rules that govern the quality of drinking water, the level of mercury in the air, the working conditions of employees, or the development of wetlands, for example, have a direct impact on the quality of life of Michigan residents. State agencies' authority to promulgate rules is not unfettered; it exists only to the extent granted by statute. The rule-making process already contains many checks and balances, including the opportunity for public comment and legislative oversight. If there is a need to give stakeholders more input or to increase transparency, the process itself can be refined.

Furthermore, some complaints about overregulation have nothing to do with State administrative rules, but may be the result of a local ordinance, permitting process, or zoning regulation, or the actions of a local official. Limiting the authority of State agencies to promulgate rules would not address these issues.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bill 434 (S-1)

The bill would increase the costs of State agencies that promulgate administrative rules by an unknown amount due to the additional procedural requirements that would apply to the development of administrative rules. The costs of the State Office of Administrative Hearings and Rules within the Department of Energy, Labor, and Economic Growth also would increase; however, the amount of the impact is indeterminate.

The bill would expand the potential for judgments against the State due to violations of the rule-making process. The cost of potential damages would depend on the number and types of suits brought and their final disposition.

Senate Bill 435

The bill would increase the costs of State government due to the expanded annual review of rules that would be required of each State agency and the proposed review every five years of the impact of the rules on small businesses and other regulatory issues. These reviews would require additional staff effort by State agencies and the State Office of Administrative Hearings and Rules. The amount of additional cost is unknown. The costs of SOAHR are billed back to departments through interdepartmental grants.

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz

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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.