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BILL ANALYSIS



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Senate Bill 434 (as introduced 4-2-09)
Sponsor: Senator Jud Gilbert, II
Committee: Economic Development and Regulatory Reform

Date Completed: 5-13-09

CONTENT

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

- **Make changes regarding the enforcement and scope of rules.**
- **Require a State agency to include a "decision record" of an advisory committee or entity in its rule-making request submitted to the State Office of Administrative Hearings and Rules (SOAHR).**
- **Expand an agency's responsibilities in reducing the economic impact of a rule on small businesses.**
- **Provide that a rule would not be valid unless it were processed in compliance with requirements regarding rule-making requests and advisory recommendations, impact on small businesses, and regulatory impact statements.**
- **Require an agency's regulatory impact statement to include the methodology used in determining the impact of a proposed rule and a cost-benefit analysis of the rule.**
- **Require an agency to publish a regulatory impact statement on its website before a public hearing.**
- **Allow a declaratory judgment that a rule or its application interferes with or impairs a plaintiff's legal rights or privileges, to include the agency's failure to assess the impact of the rule on small businesses.**
- **Delete a provision under which an action for declaratory judgment may not begin unless the plaintiff first requests the agency for a declaratory ruling.**
- **Allow a person alleging a violation regarding the processing of a rule to bring an action for an award of damages, and allow the circuit court to award up to 10 times the cost of any permit fees plus costs relating to witness and attorney fees.**

The Act prescribes the process for a State agency to promulgate an administrative rule, which is a regulation, standard, policy, or ruling of general applicability that implements or applies law enforced or administered by the agency, or prescribes the agency's organization, procedure, or practice.

Enforcement & Scope of Rules

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.

Federal Standard. The bill specifies that, if an agency adopted rules in order to implement a federally delegated program, it could adopt the rules and standards as promulgated or adopted by the Federal government. The agency could not, however, promulgate or adopt a rule more stringent than the applicable Federal standard unless specifically authorized by statute to do otherwise.

Guidelines, Bulletins, Interpretive Statements, or Forms. Under the bill, a guideline, bulletin, interpretive statement, or form with instructions could not be given the force and effect of law by the agency and would be considered merely advisory. An agency could not rely upon a guideline, 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, bulletin, interpretive statement, or form with instructions, to uphold 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: Requests & Advisory Recommendations

Before initiating any changes or additions to rules, an agency must electronically file 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 when 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.
- 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 specifically address the factors described above.

Under the Act, if appropriate in reducing the disproportionate economic impact on small business of a rule, 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.

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 would be amended by the bill). 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. The bill would extend that two-year limitation to proceedings to contest a rule on the ground of noncompliance with Section 39, 40, or 45(3).

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 required to be included in a regulatory impact statement, including an identification of the sources the agency relied upon in compiling the statement. The bill would require this to include the methodology used in determining the existence and extent of the impact of a proposed rule and a cost-benefit analysis of the proposed rule. The regulatory impact statement also would have to include 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 Act contains requirements for publishing notice of a public hearing on a proposed rule. 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.

Action for Declaratory Judgment & Other 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 the impact of the rule on 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.

MCL 24.203 et al.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

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.

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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.