

ADMINISTRATIVE PROCEDURES ACT REVISIONS

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House Bill 4573

Sponsor: Rep. Gail Haines

Committee: Regulatory Reform

Complete to 5-17-11

A SUMMARY OF HOUSE BILL 4573 AS INTRODUCED 4-21-11

House Bill 4573 would amend the Administrative Procedures Act by making the changes listed below.

**A state agency would be prohibited from adopting a rule more stringent than federal standards unless specifically authorized by statute.

**In implementing a federal program, a state agency would be required to adopt the rules as promulgated by the federal government unless statute allows for a more efficient process.

**A guideline, operational memorandum, bulletin, interpretive statement, or instruction form would be considered advisory and not given the force and effect of law. A state agency could not rely on a guideline, operational memorandum, bulletin, interpretive statement, or instructions to support its decision to act or not act if that decision is subject to judicial review. Additionally, a court could not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or instructions to uphold an agency decision to act or not act.

**In instances where a statute says a state agency can proceed by rule-making or by order and an agency proceeds by order instead of rule-making, the order would not be given general applicability to people who were not parties prior to the proceeding or contested case before the issue was ordered

**A rule could not exceed the rule-making delegation contained in the statute that authorizes the rule making.

**If an agency receives recommendations from an advisory committee or other advisory entity created by law regarding a request for rule-making, the advisory committee would have to issue to the agency a *decision record*. The decision record must be posted on an agency website for at least 60 days before the request for rule-making is submitted to the State Office of Administrative Hearings and Rules (SOAHR). [This office has been renamed as Office of Regulatory Reinvention (ORR)]

"Decision record" means, in regard to a request for rule making where an agency receives recommendation or comments by an advisory committee or other advisory entity created

by law, all of the following: (1) the minutes of all meetings related to the request for rule-making, (2) the votes of members, and (3) the discussion and reasoning in support of the decision.

**The ORR would not be required to approve a rule-making request and could do so only after indicating in its response to a request that there are appropriate and necessary policy and legal bases for approving the request for rule-making.

**Currently when a state agency proposes new rules for small businesses and those rules will have a disproportionate impact on small businesses because of their size, the agency has to reduce the economic impact on small business by doing one or more of the following when it is lawful and feasible:

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

House Bill 4573 would rewrite this provision so that when a state agency proposes new rules for small businesses and those rules will have a disproportionate impact on small businesses because of their size, the agency would be required to consider exempting small businesses. If not exempted, the agency must reduce the economic impact of the rule by doing all of the following when it is lawful and feasible. (These factors must also be specifically addressed in the small business impact statement.)

- 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 report requirements for small businesses under the rule and identify the skills necessary to comply with the requirements.
- Establish performance standards to replace design or operational standards required in the proposed rule.

Along with a notice of transmittal, an agency would also be required to include the request for rule making, the response from the ORR, a small business impact statement, and a regulatory impact statement. This bill would add additional requirements for the regulatory impact to include (1) a comparison of the proposed rule to standards in other states in the region and a statement of whether the rule exceeds standards in such cases, (2) an identification of the sources the agency relied upon in compiling the regulatory impact statement, including the methodology utilized in determining the existence and extent of the impact of a proposed rule and a cost benefit analysis of the proposed rule,

and (3) a detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact the of the rule on small businesses.

**Within two business days after a transmittal the ORR would be required to post the following information on its website: (1) the small business impact statement and regulatory impact statement received under Section 45(3), (2) instructions on any existing administrative remedies or appeals available to the public, (3) instructions regarding the method of complying with the rules, and (4) any rules filed with the Secretary of State and their effective date.

**The bill would require regulatory impact statements to contain a comparison of a proposed rule to standards in other states in the Great Lakes region and a statement of whether the rule exceeds standards in such cases.

**Current law requires that a proceeding to contest the validity of the processing of a rule on the grounds of noncompliance with relevant provisions of the APA must begin within two years after the rule goes into effect. Additionally, the act provides that unless an exclusive procedure or remedy is provided by statute, the validity or applicability of a rule may be determined in an action for declaratory judgment if the court finds the rule or its application interferes or impairs, or threatens to interfere or impair, the legal rights of the plaintiff. The bill would amend that provision so that the failure of an agency to accurately assess the impact of a rule on businesses, including small businesses, in the regulatory impact statement would also be taken into account in judging the validity or applicability of a rule.

**This bill also allows a person alleging a violation regarding the processing of a rule to bring action for damages in the circuit court of the county in which the plaintiff resides or in the Ingham County Circuit Court. If a violation is found to have occurred, the court can award up to 10 times the cost of any permit fees, as well as, the actual and reasonable costs for witness and attorney fees.

FISCAL IMPACT:

The bill would increase the costs of processing administrative rules by the several departments and agencies. While current law requires departments and agencies to consider the impact of proposed administrative rules on small businesses, this bill would require a more detailed review of proposed rules on effected entities. The bill would also require a more expansive review of proposed administrative rules - including comparison of similar rules with neighboring states and applicable federal rules - as well as a cost-benefit analysis of the proposed rules. This provision would increase departmental and agency administrative costs by a relatively minor amount. The cost-benefit analysis would tend to increase costs for the promulgating agencies, particularly for more complex rule sets, as agencies could find it necessary to contract with industry experts to assist in the analysis. Technically, the cost-benefit analysis requirement would impose no additional costs on the promulgating agencies as Executive Order 2011-5 already requires completion of a cost-benefit analysis for all proposed rule sets.

The bill also restricts the ability to departments and agencies in promulgating administrative rules that are more stringent than applicable federal standards. This provision would have an indeterminate fiscal impact on the state and local units, depending on how it ultimately impacted rules promulgated by the several departments and agencies. Recent experiences with some agencies promulgating rules that have (or would have) exceeded the applicable federal requirements have yielded divergent opinions on the cost impact of those rules, with rules potentially resulting in cost increases on regulated industries (under one view) and cost savings (under another view).

The bill also expands the ability of affected interests to challenge the validity of administrative rules and be compensated for damages when an agency is found to have violated the APA's rule-promulgation provisions. Making an agency liable for damages would tend to increase state costs, although the extent to which costs would increase isn't known. It's not immediately known how often rules are invalidated by the courts. The bill provides that the damage award would be up to 10 times the amount of any permit fees paid by the challenging party.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.