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BILL ANALYSIS

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Senate Bills 271, 272, and 274 (as introduced 3-17-11)

Sponsor: Senator Jack Brandenburg (S.B. 271)

Senator Mike Kowall (S.B. 272)

Senator John Pappageorge (S.B. 274)

Committee: Economic Development

Date Completed: 4-13-11

CONTENT

The bills would amend the Administrative Procedures Act (APA) to revise provisions that govern the promulgation of administrative rules.

Senate Bill 271 would do the following:

- Require the State Office of Administrative Hearings and Rules (SOAHR) to include a small business impact statement with its notice of transmittal to the Joint Committee on Administrative Rules (JCAR) regarding a proposed rule.
- Require a regulatory impact statement to include comparison of a proposed rule to standards in other states in the Great Lakes region, and other information.
- Require an agency to post a regulatory impact statement on its website at least 10 days before a public hearing on a proposed rule.

Senate Bill 272 would do the following:

- Prohibit an agency from promulgating a rule more stringent than the applicable Federal standard unless specifically authorized by statute.
- Require an agency to adopt Federal rules and standards if it adopted rules to implement a federally delegated program.
- Specify that a guideline, operational memorandum, bulletin, interpretative statement, or form with instructions would be advisory

only and could not be given the force and effect of law.

- Prohibit a rule from exceeding the rule-making delegation in its authorizing statute.
- Require an agency to consider exempting small business from a rule under certain circumstances and expand the methods by which an agency must reduce the economic impact of a rule on small business.
- Revise a provision pertaining to a challenge to the validity or applicability of a rule.
- Allow a court to award up to 10 times the cost of any permit fees plus actual and reasonable costs for witness and attorney fees if the court determined a rule-processing violation had occurred.

Senate Bill 274 would do the following:

- Allow JCAR to hold a hearing on any rule previously filed with the Secretary of State or on any matter it considered appropriate.
- Require an agency to withdraw any rule pending before JCAR at final adjournment of a two-year legislative session and resubmit that rule.

Senate Bill 271

Under the APA, after the required notice is given for a proposal of a rule and before the agency proposing the rule has formally

Senate Bill 272

adopted it, the agency must prepare an agency report containing a synopsis of the comments contained in the public hearing record and a copy of the regulatory impact statement required by the Act. Under the bill, that report also would have to contain a copy of the request for rule-making (which an agency is required to file with SOAHR before initiating changes or additions to rules).

The APA requires SOAHR to transmit the agency reports, a copy of the regulatory impact statement, and certificates of approval from the Legislative Service Bureau and SOAHR, by notice of transmittal, to JCAR. An agency must prepare and include a regulatory impact statement with a notice of transmittal. Under the bill, an agency also would have to prepare and include with a notice of transmittal the request for rule-making, the response from SOAHR, and a small business impact statement.

The APA specifies information that a regulatory impact statement must contain. Under the bill, that statement also would have to include both of the following:

- A comparison of the proposed rule to standards in other states in the Great Lakes region and a statement of whether the rule exceeded standards in those states.
- A detailed recitation of the efforts of the agency to comply with the Act's mandate to reduce the disproportionate impact of the rule upon small business.

In addition, the APA requires a regulatory impact statement to contain an identification of the sources the agency relied upon in compiling that 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 APA requires an agency to electronically transmit a regulatory impact statement to SOAHR at least 28 days before a required public hearing. The bill also would require the agency to publish the regulatory impact statement on its website at least 10 days before the date of the public hearing.

Scope of Rules

The APA provides that the violation of a rule is a crime when so provided by statute, but prohibits a rule from making an act or omission to act a crime or prescribing a criminal penalty for the 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 a violation, unless provided for by statute.

The bill would prohibit an agency from promulgating or adopting a rule more stringent than the applicable Federal standard unless specifically authorized by statute.

Under the bill, if an agency adopted rules in order to implement a federally delegated program, the agency 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.

The bill specifies that a guideline, operational memorandum, bulletin, interpretative 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 the agency's 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 an agency decision to act or refuse to act.

If a statute authorized an agency to proceed by rule-making or by order and an 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 issuance of the order.

A rule could not exceed the rule-making delegation contained in the statute authorizing the rule-making.

Impact on Small Business

Under the APA, 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 the size of those businesses, 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.
- Consolidate or simplify the compliance and reporting requirements for small businesses.
- Establish performance rather than design standards, when appropriate.
- Exempt small business from any or all of the rule's requirements.

The bill instead would require the agency to consider exempting small business and, if not exempted, 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 authorizing statute:

- 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 after projecting the required reporting, record-keeping, and other administrative costs.
- Consolidate, simplify, or eliminate the compliance and reporting requirements for small businesses 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.

Those factors would have to be addressed specifically in the small business impact statement.

Under the APA, if appropriate in reducing the 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.

The bill would require an agency to use those classifications in reducing the disproportionate economic impact of a rule on small business.

Challenge to Validity or Applicability of Rule

The APA specifies that, unless an exclusive procedure or remedy is provided by a statute governing the 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, determination of the validity or applicability of a rule would include the failure of an agency to assess accurately the impact of the rule on businesses, including small businesses, in its regulatory impact statement.

The bill would delete a provision under which an action for declaratory judgment may not be commenced unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.

The bill would allow a person alleging a violation of Chapter 3 (Procedures for Processing and Publishing Rules) regarding the processing of a rule to bring an action for damages in the circuit court of the county in which the plaintiff lived or in the circuit court for Ingham County. If the court determined that the violation had occurred, it could award up to 10 times the cost of any permit fees as well as the actual and reasonable costs incurred for witness and attorney fees.

Senate Bill 274

The Joint Committee on Administrative Rules consists of five members of the Senate and five members of the House of Representatives. Of the members from each chamber of the Legislature, three are from the majority party and two are from the minority party. The chairperson alternates between houses each year. The APA authorizes JCAR to hold a hearing on a rule transmitted to the Committee. Under the

bill, JCAR also could hold a hearing on any rule previously filed with the Secretary of State, or on any other matter the Committee considered appropriate.

Under the APA, after JCAR has received a notice of transmittal for a proposed rule, the Committee has 15 session days in which to consider the rule and to object to it by filing a notice of objection approved by a concurrent majority of the Committee members, or JCAR may, by concurrent majority, waive the remaining session days.

The bill would require an agency to withdraw any rule pending before JCAR at the final adjournment of a regular legislative session held in an even-numbered year and resubmit that rule. A new and untolled 15 session-day time period would begin upon resubmission of the rule to the Committee for consideration. Under the Act, "session day" means a day in which both the Senate and the House convene in session. Under the bill, the definition would refer to such a day in which a quorum was recorded.

MCL 24.245 (S.B. 271)
24.232 et al. (S.B. 272)
24.235 & 24.245a (S.B. 274)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Senate Bill 271

The bill would require additional content in regulatory impact statements issued by State agencies that are proposing new administrative rules. To the extent that agencies are not already analyzing the impacts of new rule proposals on small businesses and comparing the proposals to similar rules already established in other Great Lakes states, the bill would result in some additional administrative costs to these agencies.

Senate Bill 272

The bill would add several requirements for State agencies proposing new administrative rules. These new requirements would result in some additional, relatively minor, administrative costs.

Senate Bill 274

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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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.