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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/09  
 LAST UPDATED 03/12/09 HJR 6/HVECS

SPONSOR HVEC

SHORT TITLE Legislative Review of Executive Rules, CA SB \_\_\_\_\_

ANALYST Hoffmann

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	See Narrative		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bill 18, which proposes negotiated rulemaking committees. This also relates to House Bill 45 which proposes the establishment of a “regulatory impact statement.”

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09 Indeterminate but substantial	FY10 Indeterminate but substantial	FY11 Indeterminate but substantial	3 Year Total Cost Indeterminate but substantial	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1	\$0.1	\$0.1	Recurring	

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
 State Records Center and Archives (SRCA)  
 Regulation and Licensing Department (RLD)  
 Energy, Minerals and Natural Resources Department (ENMRD)  
 Department of Health (DOH)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of House Voters and Elections Committee Amendment

The House Voters and Elections Committee amendment to House Joint Resolution 6 proposes to amend Article IV of the Constitution of New Mexico to allow the Legislature to nullify an

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adopted administrative regulation or rule of an executive agency by the passage of a resolution by three-fourths of the Legislature.

If passed, the proposed constitutional amendment would be submitted to the people for their approval or rejection at the next general election or any special election prior to that date that may be called for that purpose.

### Synopsis of Original Bill

House Joint Resolution 6 would submit to the public, at the next general election or any special election prior to that date, a proposed amendment to Article IV of the New Mexico Constitution. That amendment, if approved, would allow the Legislature to, by law, prohibit regulatory rules proposed by an agency or officer of the executive branch from taking effect until the proposed rules were reviewed and approved by the appropriate interim or standing committees of the Legislature.

The amendment, if approved, would further allow the Legislature to, by law, empower the appropriate interim or standing committee to review a regulatory rule that has been adopted by an agency or officer of the executive branch and to annul the rule if the committee finds that the agency or officer of the executive branch was not authorized to adopt the rule.

### **FISCAL IMPLICATIONS**

As stated by the Health Policy Commission, fiscal implications would depend on the nature of the regulations, the general fund may be impacted if the regulations proposed have revenue generating intent and are delayed or annulled by having a legislative review.

As stated by the Energy, Minerals and Natural Resources Department, at this point, the fiscal impacts of this Constitutional amendment can not be determined. If the amendment passes and the legislature decide to act, the implementing legislation will determine which agencies are covered and how the process will unfold.

The New Mexico Environment Department similarly notes that it is not possible at this time to quantify the fiscal implications House Joint Resolution 6 would have on the Environment Department. However, if a regulation was stayed until the Legislature could review and approve the rule or it was or annulled, there could be severe impacts on the Department. The impacts include the potential withdrawal of federal funding for projects that require rule revision, a hiring freeze for positions created or dissolved through a regulation and increased employee time spent promoting the regulation to the legislative committee after board or commission promulgation.

### **SIGNIFICANT ISSUES**

According to the Public Education Department, since this is a resolution to submit a proposed amendment to the New Mexico Constitution at the next general or special election, the proposed change could only take effect if the public voted in favor of it. Should the amendment be voted for in the affirmative, yet another layer of bureaucracy would be added to the rulemaking process, resulting in a much lengthier and more cumbersome process. Such an amendment would be inconsistent with the Executive Reorganization Act, which authorizes cabinet secretaries to "...make and adopt such reasonable and procedural rules and regulations as may be necessary to

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carry out the duties of the department and its divisions.” Moreover, such an amendment would implicate Article III, Section 1 of the New Mexico Constitution relative to the separation of powers between the executive, judicial and legislative branches of government.

Essentially, the proposed amendment would permit the Legislature to “micromanage” the rulemaking authority of the state’s executive agencies. For the most part, rules could not be adopted without legislative approval. Such a scheme is inefficient. *See e.g. I.N.S. v. Chadha*, 462 U.S. 919, 954 (1983) (providing that executive action under legislatively delegated authority that might resemble “legislative” action in some respects is not subject to the approval of the Houses of Congress and the President).

Paragraph B on page 2 of House Joint Resolution 6 empowers an interim or standing committee to annul a rule if it finds that the agency or officer of the executive branch was not “authorized” to adopt the rule. It is unclear what “authorized” means in this context. It is unclear whether an agency would be “authorized” only if it is specifically contemplated in written statute or whether an agency would be “authorized” if an interim or standing committee approved the rule prior to adoption. This provision clearly usurps the power of the judiciary branch of government, resulting in the bill again implicating Article III, Section 1 of the New Mexico Constitution relative to separation of powers. Paragraph B of House Joint Resolution 6 also allows the interim or standing committees to unilaterally annul existing rules if the committee found the rules were not “authorized”. Such a provision may allow interim or standing committees to undo existing regulatory rules.

According to the Energy Minerals, and Natural Resources Department, House Joint Resolution 6 represents a fundamental change in the New Mexico Constitution by allowing the legislature to review rules proposed by the Executive Branch.

Under Article III, section 1 of the Constitution, New Mexico has always recognized and enforced a strict separation of powers among the 3 branches of government: These branches are the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

This provision “generally bars one branch of government from performing a function reserved for another branch of government”. *Old Abe Co. v. N.M. Mining Comm’n*, 121 N.M. 83, 94 (Ct. App. 1995). The power to adopt rules is housed in the Executive Branch. An Executive Branch agency or official is granted powers to adopt specific rules by the legislature. After a public process and based on a record, the agency or official adopts the rules which are then subject to review by the Judicial Branch. The courts may overturn a rule if it conflicts with Legislative laws, if the agency failed to follow the laws for adopting the rule or if the agency’s action is arbitrary, capricious or not supported by the agency record.

The Attorney General’s Office maintains that the concepts of “separation of powers” and the “non-delegation” doctrine are fundamental concepts in the United States Constitution, implemented to keep the different branches of government distinct in order to prevent abuse of power. See Articles I, II, and III of the United States Constitution. Those concepts were included in the New Mexico Constitution when it was submitted for congressional and presidential approval pursuant to Sections 3 and 4 of the “Enabling Act for New Mexico”, 36 Statutes at

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Large 557, Chapter 310(1910). Article VI of the United States Constitution requires members of state legislatures to be “bound by Oath or Affirmation to support this [Federal] Constitution”. The provisions of the joint resolution may also violate that provision, if construed as an unlawful usurpation and delegation of Executive Branch authority by the State Legislature.

If the amendment is adopted and the legislature inserts itself into the rulemaking process, the roles of the other branches are diminished and perhaps rendered meaningless. If the legislature or a legislative committee can reject or modify a proposed rule for whatever reason, then the process by which the agency obtains public comment on a rule and reaches a decision based on a record becomes moot.

Likewise, the role of the Judicial Branch becomes confused or perhaps impossible if the legislature changes or rejects a rule. The courts will have no record and no standard against which to judge the legislature’s decision on the rule. Thus, the legislature will have usurped the power of the both the Executive and the Judicial Branches

The Regulation and Licensing Department observes that the current promulgation process includes extensive notice requirements, solicitation and consideration for public input as well as transparency through the Open Meetings Act and other statutory provisions. House Joint Resolution 6 does not define any such processes to precede legislative review or action.

### **ADMINISTRATIVE IMPLICATIONS**

The State Rules Division states that this resolution could have an impact on the compilation of the New Mexico Administrative Code and the publication of the New Mexico Register. Existing rules that are annulled would need to be removed from the Administrative Code and that could require additional staff time. There is also a question of whether notices of prohibited or annulled rules would need to be published in the New Mexico Register so the public would be aware of the action.

### **OTHER SUBSTANTIVE ISSUES**

The Environment Department notes that HJR 6 is a change in the rulemaking process. The Legislature is lobbied, but boards and commissions are quasi-judicial in nature and ex-parte contacts are prohibited. The decision made by boards and commissions must be made on the evidence in the record, not from ex-parte contacts. This is another reason for the separation of powers between the branches of government.

The Energy, Minerals and Natural Resource Department observe that this fundamental change in rulemaking process may also create significant fairness issues. Controversial rulemaking proceedings often involve two or more competing interest groups seeking to have their concerns reflected in the final rule. Under the current process, these groups participate in the administrative rulemaking and submit evidence and testimony which becomes part of the record. If the Legislature adopts a review and approval process, then either some groups will get two “bites at the apple”, or some groups may decide to bypass the administrative process and go directly to the Legislature. The agencies will be left with an incomplete record if groups ignore their process.

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Another fairness issue relates to judicial appeals. If the agency makes a decision on a rule, a party may challenge that decision in court on various grounds including lack of substantial evidence in the record, arbitrary or capricious actions or conflict with law. If the Legislature changes a rule to benefit one interest, the other interest groups will have little or no recourse to the courts to challenge the Legislature. There will be no record to review and no standard to apply.

Finally, an agency is generally prohibited from having “ex parte” contacts with the parties and must make its decision on a record that all parties can contribute to, and can later use to challenge the decision. The Legislature allows lobbying and ex parte contacts and has no record on which it must base its decision. Thus, this amendment is fundamentally at cross-purposes with the due process requirements of Article II, Section 18, of the New Mexico Constitution.

### **ALTERNATIVES**

The State Rules Division notes that the Uniform Law Commission (ULC) has spent the last five years working on a revised Model State Administrative Procedure Act that should be finished before the end of 2009. Article 7 of the current draft version of the Model Act deals specifically with legislative review of rules. The members of the drafting committee working on the revision have studied many states and examined the issues associated with this subject. Some consideration might be given to waiting until the Model State Administrative Procedure Act is finished to see what best practices are suggested.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

According to ENMRD, the consequences of not enacting HJR 6 would mean there would be no delays in administrative rulemaking and the powers of legislative, judicial and executive branches of government remain separate. Environmental rulemaking occurs within a structure that requires commission or board approval and public participation remains within the confines of the Separation of Powers clause of the New Mexico Constitution.

CH/mt/mc