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FISCAL IMPACT REPORT

ORIGINAL DATE 1/24/09

SPONSOR Leavell LAST UPDATED _____ HB _____

SHORT TITLE Negotiated Rulemaking Committees SB 18

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB45

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Commission of Public Records (CPR)
 Energy Minerals and Natural Resources (EMNRD)
 Human Services Department (HSD)
 Department of Health (DOH)
 Public Education Department (PED)

SUMMARY

Synopsis of Bill

Senate Bill 18 amends Section 9-1-9 of the Executive Reorganization Act to permit a department secretary to establish a committee to negotiate and develop a proposed rule. The decision to establish a committee is left to the discretion of the secretary if he or she determines it would be in the public interest. If a committee is established, it must be composed of a balanced representation of interested persons and stakeholders and the bill's requirements for notifying the public, applying for membership on the committee and reporting by the committee will apply. A secretary who establishes a negotiated rulemaking committee must submit a written report to the governor, president pro tempore of the senate, speaker of the house and appropriate interim legislative committees. A final rule is not required to reflect the consensus of the committee, but if it does not, the secretary's report must explain why the agency departed from the consensus.

SIGNIFICANT ISSUES

According to the Commission of Public Records, the placement of this amendment in the Executive Reorganization Act may be questionable. First, the title of the bill begins *relating to administrative procedures*, yet the bill amends the Executive Reorganization Act. New Mexico has an Administrative Procedures Act, although it has little practical applicability. It is found in Chapter 12, Article 8 NMSA 1978. That may provide a more logical placement. Further, Section 9-1-9 NMSA 1978 deals with advisory committees in general, not with specific committees (its intent was to control formation of advisory committees). The new Subsection J only covers negotiated rulemaking committees, which are a specific type of advisory committee. It may not be advisable to have nine subsections describing general provisions for all advisory committees and one subsection dealing with the specifics of one type of committee. Another issue with the amendment to the particular section in the Executive Reorganization Act is that the section only covers certain agencies, not all rulemaking agencies.

The agency also adds that in Subsection J, there is a provision which specifies that in order to establish a negotiated rulemaking committee, a secretary shall publish a notice. The bill does not state where the notice should be published. Currently most agencies are required to publish notices of rulemaking in two places: the NM Register and a newspaper of general circulation. It would be advisable to clearly state where the notice should be published. A strong suggestion would be to have the notices published in the NM Register because it is the official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico (Section 14-4-7.1 NMSA 1978).

Lastly, the Commission of Public Records explain that there has been discussion among administrative law scholars if the term “negotiated rulemaking” is the best way to describe the activity established in the bill. The term has been used at the federal level for many years; however, many states do not employ that term. For example, states have used the terms: advanced notice of proposed rulemaking (draft model state act), notice of intent (Idaho), informal conference (Montana), advice on possible rules (Minnesota), advisory committees (Wisconsin), and rule development workshops (Florida), to name a few. Some of the states chose other terms to clarify that the activity of forming a committee was not to negotiate the content of a rule (similar to what is done with contracts) but to obtain expert advice from diverse sources prior to formal rulemaking.

PERFORMANCE IMPLICATIONS

The Attorney General’s Office considers that since it is left to the discretion of a department secretary, the impact of the bill is unknown, but likely relatively ineffective. However, the need for the bill is unclear since most department secretaries and agency heads and governing bodies already have sufficient authority under their rulemaking authority to establish committees and seek the input of interested parties if they believe it would be helpful. A department secretary could use other means of soliciting the views and consensus of persons who will be affected by or are otherwise interested in a proposed rule without having to make the report required by the bill. Consequently, any reports received by the governor and legislative representatives under the bill may not accurately reflect the extent to which cabinet departments involve interested parties and seek consensus as part of the rulemaking process. Because compliance is not required or obviously advantageous, it is possible that the bill, if enacted, would result in a law that is largely ignored and ineffective.

ADMINISTRATIVE IMPLICATIONS

Some agencies explain the implementation of an informal negotiated rulemaking process and suggest that the bill may result in delay to rulemaking and add a layer of paperwork should the agency depart from a consensus to issue a rule.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 18 relates to House Bill 45 in that both add requirements to the rulemaking process.

TECHNICAL ISSUES

The AGO offers the following recommendations: amend the title of Section 9-1-9 (p. 1, lines 18-20) to include a reference to negotiated rulemaking committees and on page 3, line 22 it requires the members of a committee to be a “balanced representation of persons and stakeholders of interest...” This phrase would make more sense if it referred to a “balanced representation of interested persons and stakeholders.”

OTHER SUBSTANTIVE ISSUES

The Commission of Public Records explains that many agencies already employ informal processes for obtaining information and advice prior to formal rulemaking. Senate Bill 18 would standardize the process for those agencies under the Executive Reorganization Act that choose to use it. Standardizing the negotiated rulemaking procedure may cause conflict with some of the established rulemaking processes already used by agencies. It is difficult to determine the extent of potential conflict because rulemaking processes differ from agency to agency in New Mexico.

The provisions of this bill may be overly cumbersome which could deter agencies from using this process. It is not clear from the text if this is the only option that would be available to agencies for obtaining information prior to formal rulemaking. If this is the only option, agencies may shy away from seeking information at all prior to rulemaking.

ALTERNATIVES

The Commission of Public Records considers the draft text of the revised Model State Administrative Procedure Act may provide some guidance on a simpler process that could be used. The text from the current draft copy of the revised Model State Administrative Procedure Act is as follows:

SECTION 303. ADVANCED NOTICE OF PROPOSED RULEMAKING; NEGOTIATED RULEMAKING.

(a) An agency may gather information relevant to the subject matter of possible rulemaking and may solicit comments and recommendations from the public by publishing an advanced notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a rulemaking under active consideration within the agency. The committee, in consultation with one or more agency representatives, may attempt to reach a consensus on the terms or substance of a proposed

rule. In making the appointments, the agency shall attempt to establish a balance in representation among persons known to have an interest and the public. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin]. Notice of a meeting of a committee appointed under this subsection must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of a committee appointed under this section is open to the public.

(c) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of the rulemaking by any other method or procedure used in rulemaking.

EO/mt