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FISCAL IMPACT REPORT

ORIGINAL DATE 02/04/13
LAST UPDATED 02/11/13 **HB** 108/aHHGIC

SPONSOR Gentry/Ivey-Soto

SHORT TITLE Rules Development Requirements **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	TBD*	TBD*	TBD*	TBD*	Recurring	General Fund and Others

(Parenthesis () Indicate Expenditure Decreases)

*It is not possible to quantify the fiscal impact of this bill, but several agencies assert additional costs and operating expenses. See Fiscal Implications below.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Taxation & Revenue Department (TRD)
 Commission of Public Records (CPR)
 Economic Development Department (EDD)
 Energy, Minerals & Natural Resources Department (EMNRD)
 Medical Board (MB)
 Office of the State Engineer (OSE)
 Department of Health (DOH)

SUMMARY

Synopsis of HHGIC Amendment

The House Health, Government & Indian Affairs Committee amendment to House Bill 108 (1) requires an agency adopting an emergency rule provide a “detailed justification” for its finding that an emergency rule is warranted; (2) requires that the default procedural rules to be written by the Attorney General be completed within 6 months of the effective date of the act; and (3) states that no rule can conflict with statute and a rule cannot define a word that is defined in an applicable statute.

Two agencies suggest that two of the amendments to Section 13 may be drafted too broadly. First, as to language seeking to avoid conflicts between agency rules and existing statutes, when a rule conflicts with the terms of a statute, courts invalidate only the conflicting portions of the rule, rather than the rule as a whole. The language of the amendment may be read to strike the entire regulation even when only a portion of the rule conflicts with the underlying statute. Second, as to the prohibition against defining a word that is already defined in statute, the Energy, Minerals and Natural Resources Department (EMNRD) explains that some rules repeat statutory definitions so the public and the regulated community can see all the relevant definitions in one place and understand the rule in the context of the statute and its definitions. If the intent of this change is only to prevent a rule from changing a definition set forth in statute, that intent may be clarified by modifying the second sentence in amendment three to read : “A word that is defined in an applicable statute shall not be defined differently in rule.”

Synopsis of Original Bill

House Bill 108 (HB 108), introduced on behalf of the Economic and Rural Development Committee, provides detailed, uniform procedures for the state agency rulemaking process. It amends the State Rules Act to include requirements that each agency provide:

- an annual regulatory agenda of the rules it expects to promulgate in a fiscal year (Section 2);
- a preliminary outline of a proposed rule prior to public notice (Section 3);
- a rule drafting committee, if appropriate, to draft a rule (Section 4);
- more comprehensive public notice (Section 5);
- the minimum requirements for public participation and comments during the rulemaking (Section 6);
- the maintenance of a rulemaking record available through the sunshine portal (Section 7); and
- a concise explanatory statement for the agency’s reasons for adopting the proposed rule, including the agency’s reasons for not accepting substantial arguments made in testimony and comments (Section 8).

HB 108 also allows a limited option for emergency rules (Section 9), limits the ability of an agency to change a proposed rule before filing (Section 10) and establishes time limits for the adoption of a rule change (Section 11).

In addition, HB 108 amends existing sections of the Act to add definitions necessary for the rulemaking process (Section 1) and to coordinate the new process with existing rule filing requirements (Sections 13 and 14). The Attorney General is required to adopt procedural rules for use by agencies (Section 12).

FISCAL IMPLICATIONS

Five agencies report no or minimal fiscal impact if this bill is enacted. However, some anticipate greater impact.

The Commission of Public Records (CPR) reports that because it would have to maintain the concise explanatory statements that must be filed with rules, it would have to develop both the

process and means of filing and retaining those documents. That process would result in continuing costs, although those costs are difficult to determine. The CPR also notes that the explanatory statements filed with the records center would be public documents and will require the agency to develop a means of providing ready access.

Both physical retrieval and on-line posting would involve additional and perhaps significant staff time and resources. The CPR advises that it will need to dedicate at least .25 FTE to managing these statements. Lastly, the CPR reports that existing on-line training on style, formatting and filing requirements would need to be expanded and new instructional materials developed to address the new requirements contained in HB 108.

While recognizing that wide publication and public access to rulemaking and regulatory proceedings is important and timely availability of necessary information for public participation in these governmental activities is of fundamental importance, the Taxation and Revenue Department (TRD) takes issue with three specific provisions of HB 108 concerning public notice. First, as to publication in languages other than English, The TRD believes that translating a rule or regulation itself (as opposed to notices and summary descriptions) could result in unintended differences in interpretation simply due to imprecision in literal translations. Second, the timing of posting on the state's sunshine portal is not within an individual agency's control and could lead to problems. Thirdly, if HB 108 is read to require publication in each county for rules and regulations having a state-wide effect, it could lead to unreasonable cost with minimal benefit.

SIGNIFICANT ISSUES

The ENMRD provides this summary of the background, purpose and effect of this bill:

HB 34 is intended to provide a uniform process for the consideration of rule changes while increasing the opportunities for the public to learn about and participate in the rulemaking process including notice that occurs prior to any formal rule proposal. Currently, each agency has its own process for adopting rules, which may be outlined in a statute or by agency rule or policy. The Administrative Procedures Act, NMSA 1978, Sections 12-8-3 to -7 (APA), provides a basic process for adopting rule changes but these procedures apply to hardly any agencies. HB 108 will establish a process that applies to all state agencies and expands opportunities for public notice and input well beyond the current APA.

Many of the rulemaking requirements in HB 108 are currently followed by most state agencies, but HB 108 also adds many more requirements to the State Rules Act for state agencies to follow. These include developing an annual regulatory agenda which must be updated regularly, providing a preliminary outline for a possible rulemaking before the formal rulemaking process begins, using the state's Sunshine Portal to provide information to the public, allowing the agency to use a rule drafting committee to develop consensus on rule changes and providing a written statement that explains the agency's action in adopting any rule changes. These changes increase the opportunities for the public to become aware that an agency is considering a rule change and to become involved with the process.

The CPR, the Attorney General's Office (AGO) and other agencies agree that HB 108 makes the rulemaking process more consistent across state agencies, making it easier for the public to understand and participate in the process.

However, the Office of the State Engineer (OSE), along with the CPR and the AGO, point out that HB 108 could raise a more general problem because the procedures it spells out may conflict with other statutes that require certain rule-making processes specific to an agency. As explained by the OSE:

Many agencies have statutory procedures for rulemaking that set out specific timelines for when notice to the public, publication of a proposed rule and the holding of a hearing must take place. Without repeal of those statutes specific to an agency, the timelines in HB 108 would conflict with existing statutory timelines creating confusion as to which controls. In addition, challenges to the validity of a rulemaking would become more likely with the ambiguity created by the need to interpret and reconcile existing laws.

The CPR and the AGO specifically direct attention to the Uniform Licensing Act, which contains rule-making requirements for licensing boards that could conflict with this bill: for example, section 61-1-29 requires a board make reasonable efforts to give notice of rulemaking to licensees and the public, while HB 108 requires more specific actions such as posting on the agency website and the sunshine portal, providing notice to the legislative council service, and where applicable providing information in languages other than English.

Similarly, as to HB 108's provisions governing emergency rules, the OSE comments:

Although Section 9(C) of HB 108 recognizes and defers to agency-specific emergency rulemaking statutes; it requires a finding under this bill's new criteria to trigger deference to the agency-specific statute. However, the agency-specific statute may include different, conflicting criteria triggering that statute, which would create yet another conflict.

These potential conflicts raise a separate concern for the AGO, given its assignment under HB 108 to draft a set of default procedural rules without statutory guidance on how to resolve differences between the dictates of HB 108 and rulemaking procedures under existing statutes.

The Department of Health (DOH) also expresses concern over the changes required in HB 108, which it contends would:

Impede an executive agency's ability to develop sound public policies, and would add little to the existing framework of rulemaking under the State Rules Act. HB 108 would require state agencies to publish notice of any rulemaking that they have contemplated, but before the actual rule text had even been written. HB 108 would further require that executive agencies consider public comments about rules before those rules have even been drafted. It is also unclear what advantage such a process would confer to the rulemaking process under the existing State Rules Act, which already provides the ability of state agencies to incorporate changes to proposed rules based on public input.

HB 108 proposes that if an executive agency creates a committee for rule-drafting, that committee must include members of the public who represent various interests which radically alters the way rules of executive agencies are created. If any individual was prevented from participating in a rule-drafting committee, he or she could conceivably say that his or her interests were not adequately represented, and that the rulemaking was unlawful for that reason. By vesting ambiguous rights on members of the public, HB 108 virtually guarantees protracted and costly litigation. HB 108 also threatens to impair the ability of agencies to promulgate rules in a timely manner.

The OSE asserts it should be exempted from the provisions of HB 108:

Given the unique status of the OSE's rulemaking authority and the unique subject matter – water rights – that the OSE regulates. Unlike most agencies, the SE has been promulgating rules under statutory authority that dates back to 1907, five years before New Mexico even became a state. The NM Supreme Court (NMSC) is perhaps the only entity in state government with longer experience in promulgating rules.

The OSE deals exclusively with water and water rights. The NMSC has consistently held that the expertise of the SE in such matters is so highly specialized that the legislature has invested him with broad, all-inclusive powers. Water rights are property rights, and the NMSC also has repeatedly recognized the need to maintain consistency in the law affecting this specific form of property. For example, to this end the NMSC has created a water judge to hear all water matters in each judicial district, and created a judge pro tempore appointed to hear nearly all NM state court water rights adjudication suits.

The OSE has developed his rulemaking process under Section 72-2-8 over more than a century. This process has been refined during that time to address the special nature of water rights and the needs of water rights owners. This process should be left undisturbed, and the SE should be exempted from this bill.

PERFORMANCE IMPLICATIONS

The CPR reports that Section 13's mandate that agencies file concise explanatory statements with it will require some staffing resources. One of the CPR's key performance measures under the Accountability in Government Act concerns the lag time between the effective date of a rule and its online availability in the NM Administrative Code. Another internal performance measure relates to the online availability of the NM Register by established publication dates. If the amendments become law, the CPR would restructure staff to ensure performance measures are met.

The AGO predicts that, given the substantial new requirements contemplated by HB 108, agencies, boards and commissions that rely on the AGO for counsel will certainly need and demand additional services from the AGO to ensure compliance. This will especially be the case while the additional requirements are still new and unfamiliar. This burden, in addition to the requirement to write default rules, may decrease the ability of the AGO to meet performance goals.

ADMINISTRATIVE IMPLICATIONS

The EMNRD comments that HB 108 will generally make rulemaking more complicated for agencies, because it provides many new procedural requirements for agencies. These requirements will likely lengthen the time for agencies to complete a rulemaking and may either discourage agencies from some rulemakings or result in consolidated rulemakings to preserve agency resources. Agencies will likely continue to propose rule changes when needed to comply with changes in federal or state laws. Agencies will need to plan for the rulemaking process to fulfill the requirements of this legislation.

TECHNICAL ISSUES

HB 108 should be clarified to provide whether this more general bill or a specific existing statute governing an agency's rule-making authority controls.

OTHER SUBSTANTIVE ISSUES

Currently, as the AGO notes, State Rules Act does not address rulemaking procedures but merely sets forth the procedures used to publish rules and formalize them into law. Arguably, the more proper place to make the amendments contemplated by HB 108 is the Administrative Procedures Act, Sections 12-8-1 to 12-8-25, NMSA 1978. That Act provides a framework for rulemaking but only applies to certain agencies. One alternative to amending the State Rules Act is to amend the Administrative Procedures Act and also make it applicable to all state agencies.

The EMNRD explains that HB 108 is the product of a Task Force that was formed in 2010 to investigate the feasibility of adopting uniform administrative laws, including those within the revised Model State Administrative Procedures Act. The Task Force started with rulemaking procedures and HB 34 is a result of the Task Force efforts. The Task Force, which was comprised of industry representatives, community group representatives and state agencies, presented its results to the Legislative interim committees.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to follow a variety of existing procedures for the promulgation of regulations as provided either by statutes or rules or agency policies.

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