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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/01/08

SPONSOR Foley LAST UPDATED \_\_\_\_\_ HB 614

SHORT TITLE Study & Legislative Approval of Rules SB \_\_\_\_\_

ANALYST Escudero

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$150.0	Non-Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Higher Education Department (HED)  
 Energy, Minerals & Natural  
 Resources Department (EMNRD)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

House Bill 614 would appropriate \$150.0 from the general fund to the Board of Regents of the University of New Mexico (UNM) Bureau of Business and Economic Research (BBER) for FY09 to conduct economic impact studies of proposed agency rules and would also impose rulemaking prerequisites. It further specifies review of proposed rules by the Legislative Finance Committee and presiding officers of the House of Representatives and Senate

### FISCAL IMPLICATIONS

The appropriation of \$\$150.0 contained in this bill is a non-recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY09 shall revert to the general fund.

This request was not submitted to the New Mexico Higher Education Department for review and is not included in the Departments legislative recommendation for FY09.

## **House Bill 614 – Page 2**

According to EMNRD, House Bill 614 will have fiscal implications in addition to the appropriation provided, because agencies that have no expertise in economic analysis will be required to conduct economic studies. In order to comply with the requirement, affected agencies would need to have additional FTEs who could provide the required expertise, or they would have to employ consultants by contract. No estimate of agency compliance costs can be made at this time because the bill's requirements are unclear, and it is unknown what rules will be proposed in future years that will require study

### **SIGNIFICANT ISSUES**

The New Mexico Higher Education Departments analysis of this bill focuses on the higher education implications of the proposed legislation. Additional insight may be obtained from other departments analyses.

According to HED, House Bill 614 would require that, prior to a state agency adopting or amending administrative rules, a study would be conducted which would include the following:

- the need for the rule,
- who would be impacted by the rule,
- the cost to comply with the rule,
- the benefits derived from the rule,
- comments and complaints from the public about the rule,
- the complexity of the rule,
- any overlap, duplication or conflict with other federal, state or local government rules.

The operational definition of agency within HB614 includes every department, agency, board, commission, committee or institution of the executive branch of state government. However, rules relating to educational institutions are not included in this proposed change in rule process.

The \$150,000 appropriation contained in this act would fund staff from the UNM/BBER to conduct economic impact studies in cooperation with agencies proposing rule changes or amendments. UNM/BBER would be consulted to provide objective economic evaluations and analyses. According to a spokesperson at the bureau, this type of work can be complex and time consuming. The studies would require working with each agency to understand what specifically would need to be evaluated and moreover would be dependent on the quality of information provided by the agencies. In addition, the volume of regulations requiring analysis and the work expectations of BBER are not made clear in this bill. Therefore it is difficult to determine if the appropriation is a suitable amount.

### **PERFORMANCE IMPLICATIONS**

According to HED, House Bill 614 would require agencies to conduct and review studies of the economic impact of a proposed rule. If the impact to the general fund is \$20 million or more, either in revenue or expenditures, further review by the Legislative Finance Committee and the House and Senate leaders are also required. Referral to standing committees of the legislature is the final step in the proposed review process. The review process must be completed ninety days before filing of the rule.

According to PED, the bill adds additional bureaucracy to the already lengthy rulemaking process, resulting in an even lengthier and more cumbersome process. Requiring such an extensive analysis (see synopsis above) of every rulemaking action would be extremely burdensome and render state agencies unable to engage in any rulemaking action in an expeditious manner. Also, it is not clear in the Act who will actually conduct the analyses. The bill states that the *agencies shall conduct and review*, yet the appropriation goes to the University of New Mexico to perform this function.

This Act is also 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 carry out the duties of the department and its divisions." Moreover, the Act implicates 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" a portion of the rulemaking authority of the state's executive agencies. Rules that have an annual negative fiscal impact of \$20,000.0 or more could not be adopted without prior legislative review. 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).

This bill also implicates Article IV, Section 16 of the New Mexico Constitution requiring clarity in bill titles, in that the title simply says "Making an Appropriation," and the substance and object of that appropriation is not indicated in the title and the object of the appropriation (the University of New Mexico) is nowhere mentioned in the text of the bill.

### **ADMINISTRATIVE IMPLICATIONS**

According to HED, UNM would be responsible for the administering these funds. The rule process would be lengthened by at least ninety days, increasing the burden on agency staff to comply with requirements for additional study.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

According to NMNRD, House Bill 14 conflicts with HB 310 which requires agencies proposing rule amendments to prepare a "regulatory impact statement" in a particular format. It is also related in subject matter to SB 505, which provides for legislative oversight of the Oil Conservation Division, including legislative review of rules that division proposes.

### **TECHNICAL ISSUES**

According to HED, HB614 definition of "rules" does not include:

- Rules made relating to the management of any particular educational institution
- Rules relating to admissions, discipline, supervision, expulsion or graduation of students from educational institutions

HB614 does not specify the conditions that would require or call for an external study to be conducted by UNM/BBER.

## **OTHER SUBSTANTIVE ISSUES**

According to EMNRD, the requirements of HB 614 are unclear in at least the following respects:

- The bill does not state what effect the failure to conduct the required study, or alleged deficiencies in the study, will have on the validity of any rule the agency adopts. Since the bill does not otherwise provide, it would seem that this issue could be raised in a judicial challenge to a rule. The agency would have to make a record of its compliance with the bill's requirements, so that there would be a basis for judicial review. The procedures and assumptions employed by the agency in conducting the required study, and the agency's conclusions, would likely be challenged in any appeal from a rule adoption or amendment. The bill provides no standards by which a court could measure sufficiency of the agency's compliance.
- There is no provision in the bill regarding who will determine whether a proposed rule will, or will not, have a \$20,000,000 impact on the general fund, thereby triggering the requirement of legislative committee review, or how that determination will be made. Without such provisions, it would seem that the validity of a rule could be attacked on appeal, if legislative review were not done, on the ground that it would, in fact, have a \$20,000,000 impact. Likely the legislative finance committee and the legislature will receive numerous requests to conduct legislative review from agencies wishing to preclude a challenge on this basis.
- The nature of the review of a proposed rule by the legislative finance committee is wholly unclear. Subsection 1.B provides that a proposed rule that has a \$20,000,000 impact must be reviewed "by the legislative finance committee, and then by the legislature pursuant to Subsection C." Apparently the review by the legislative finance committee is something different from, and preliminary to, the review by a designated legislative standing committee under Subsection C. Since "pursuant to Subsection C" qualifies only "review by the legislature," and not review by the "legislative finance committee," this sentence leaves blanks as to the nature of the review to be conducted by the legislative finance committee, and the effect of that review on the rulemaking process. It may have been intended that the legislative finance committee's review is only for the purpose of determining whether the rule meets the \$20,000,000 fiscal impact requirement, but that is not clear from the bill's language.
- The intent of Subsection 1.C would seem to be that legislative review is merely an opportunity, for ninety days, for the designated legislative committee to make an admonitory statement of support or opposition, as described in that Subsection. The implication would seem to be that the legislative committee does not have any power to veto, change or delay implementation of the rule (other than for the ninety-day period provided for its review). That, however is not clearly stated, leaving opportunities for rules to be challenged on the basis of adverse legislative committee action or inaction.

The bill requires agencies to conduct economic studies that many rulemaking agencies, including Energy, Minerals and Natural Resources Department (EMNRD), do not have the necessary

resources to conduct. Economic analyses require the expertise of economists, and most agencies do not have economists of staff nor funding to engage them as consultants.

The requirement to conduct an economic study applies to all rule changes, including technical amendments and changes that are not the subject of any controversy or changes mandated by federal programs.

According to PED, this bill conflicts with SJR 5, SJR 7 and HJR 12, which would submit to the public a proposed amendment to Article IV of the New Mexico Constitution which if approved, would allow the Legislature to prohibit 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.

It also relates to/conflicts with HB 310, which would amend the State Rules Act by adding a requirement that agencies prepare a regulatory impact statement if a proposed rule has an economic impact of more than \$25.0.

According to a UNM/BBER official, HB614 significant issues include:

- Specification of fiscal as well as economic impact studies;
- Challenges in the estimate of duration and cost of these studies; and
- The need to review other states regulations regarding impact studies of proposed rule changes.

PME/nt