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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/01/08

SPONSOR Foley LAST UPDATED \_\_\_\_\_ HJR 12

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

ANALYST Escudero

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

**DUPLICATES: SJR 7 & Portions of HJR 12 duplicate SJR 5.**

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Health Policy Commission (HPC)

Energy, Mineral & Natural Resources Department (EMNRD)

Public Education Department (PED)

Department of Environment Information Technology (DEIT)

### SUMMARY

#### Synopsis of Bill

House Joint Resolution 12 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**

None to the Public Education Department (PED).

As stated by HPC, 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 by having the legislative review.

As stated by EMNRD, 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.

As stated by DEIT, it is not possible at this time to quantify the fiscal implications House Joint Resolution 12 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 PED, as 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 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).

House Joint Resolution 12 is almost identical to SJR 5 with the exception of the inclusion of paragraph B. Paragraph B on page 2 of House Joint Resolution 12 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 12 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 EMNRD, House Joint Resolution 12 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:

The powers of the government of this state are divided into three distinct departments, 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.

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

## **PERFORMANCE IMPLICATIONS**

This bill does not implement or support the PED’s core performance measures and benchmarks.

According to EMNRD, if the amendment passes, and if the legislature covers EMNRD rules in the implementing legislation, the agency will experience significant delays in completing rulemaking. Legislative committees, including interim committees, meet infrequently and not at all during certain times of the year. Many rules adopted by EMNRD are required by federal law, and compliance with federal requirements, including funding requirements, may be impacted by delays.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

According to PED, HJR 12 duplicates SJR 7.

Portions of HJR 12 duplicate SJR 5. HJR 12 adds paragraph B, which empowers interim or standing committees of the Legislature to review a rule adopted by an agency and to annul the rule if the agency was not authorized to adopt the rule.

**OTHER SUBSTANTIVE ISSUES**

According to EMNRD, 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 group 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.

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.

According to HPC, HJR 12 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.

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

As stated by DEIT, the consequences of not enacting HJR 12 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.