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FISCAL IMPACT REPORT

ORIGINAL DATE 01/30/11

SPONSOR Garcia, M.H. LAST UPDATED _____ HB 22

SHORT TITLE Require Regulatory Impact Statements SB _____

ANALYST Wilson

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	\$10.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)
Conflicts with SB 30 & relates to SB 67

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$500.0- \$750.0	\$500.0- \$750.0	\$1,000.0- \$1,500.0	Recurring	All Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Commission of Public Records (CPR)
Department of Transportation (DOT)
Environment Department (ED)
Energy, Minerals & Natural Resources Department (EMNRD)
Human Resources Department (HSD)
Office of the State Engineer (OSE)
Public Education Department (PED)
Regulation & Licensing Department (RLD)
Taxation & Revenue Department (TRD)

SUMMARY

Synopsis of Bill

House Bill 22 appropriates \$10,000 from the general fund to the Commission of Public Records from the general fund the Commission of Public Records for the purpose of establishing a filing system for regulatory impact statements.

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The bill amends Section 14-4-2 NMSA 1978 of the State Rules Act. The definition for regulatory impact statement stipulates that the statement is for informational purposes only and further provides that the statement must:

- provide a summary of the rule;
- describe the persons or class of persons who will be affected;
- estimate the positive and negative impacts to persons, governments or the state budget;
- compare the costs and benefits of the rule to the costs and benefits of inaction;
- determine if there are less intrusive alternatives; and
- summarize public comments or other evidence submitted during rulemaking.

The bill also amends Section 14-4-5 NMSA 1978 to require that a final regulatory impact statement shall be included with the official rule filing; however, only the rule, not the impact statement, must be published. Rules must currently be published in the NM Register, so there is no change to those publication requirements. Amending language also requires that impact statements be filed for emergency rules, if they are effective for more than 30 days. Orders or statements of policy are exempted from the impact statement requirement.

HB 22 adds a new section to the State Rules Act which sets up the requirements and process for drafting regulatory impact statements. The bill mandates that an executive agency shall prepare a draft regulatory impact statement at the beginning of the rulemaking process. At the end of rulemaking, executive agencies shall file a final regulatory impact statement with the CPR. The bill requires that the State Records Administrator maintain as permanent records all filed regulatory impact statements. The State Records Administrator shall also make and distribute a list of all filed regulatory impact statements by July 1 of each year.

The bill exempts the Public Regulation Commission (PRC) from preparing and filing regulatory impact statements.

House Bill 22 also amends Section 14-4A-4 of the Small Business Regulatory Relief Act. The bill requires the submission of the draft regulatory impact statement to the Small Business Regulatory Advisory Commission if the proposed rule may have an adverse impact on small business.

If an agency is unable to complete all or part of a regulatory impact statement due to hardship, including lack of agency resources or unavailable information, the agency shall indicate the reason for the hardship in lieu of completing all or part of the regulatory impact statement.

HB 22 makes minor technical changes and adds two new definitions: one for regulatory impact statement and another for rulemaking.

The bill carries an effective date of July 1, 2011.

FISCAL IMPLICATIONS

The appropriation of \$10,000 contained in this bill is a non-recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2012 shall

revert to the general fund.

It is difficult to estimate the fiscal impact of this bill on rule-filing agencies. It will create additional work for all agencies in their rule-making activities.

The CPR is impacted directly by requiring that final impact statements be filed with rules and that the statements are prepared in the style and format established by the State Records Administrator. The bill also dictates that the State Records Administrator create and make available to the public a list of all filed impact statements and notices of exemption. The Administrator will also have to provide designated state officials an annual list.

These functions will be new for the agency and are not without continuing costs, although the exact fiscal impact is difficult to determine. Clearly, the implementation of the bill will increase work load and require at least some continuing operational expenses such as supplies and printing.

It is unclear how an agency that is unable to complete all or part of a regulatory impact statement due to hardship, including lack of agency resources or unavailable information will be impacted by this bill.

RLD states that this bill will add to the cost of rulemaking for all agencies and departments. The cost of filing rules is by the columnar inch. This means that by requiring a regulatory impact statement, additional pages will be required for every rule filing. A statement is required for initial publication and final filing. The cost over a fiscal year is likely to be significant, but it cannot be quantified because the RLD has no experience in preparing the statements. There is no corresponding appropriation to agencies and departments to cover this cost.

RLD will require agencies to hire economists to determine the impact of a potential rule on the affected persons. The requirement for a costs and benefits analysis alone will require at least 1.5 FTEs for the RLD to support the added burden of doing a legally defensible cost/benefit analysis. Conservatively, it is estimated that an economist will cost approximately \$60,000 and \$20,000 in benefits for a total of at least \$80,000 per FTE.

TRD develops between 10 and 30 new regulations every year that will be subject to the requirements in this bill. They estimate reflects one fte worth of staff time at an assumed cost of \$60,000 per year including benefits.

SIGNIFICANT ISSUES

House Bill 22 will create additional steps in the rule-making process. This could well slow down the promulgation of rules and will increase staff time for filing agencies, as well as for the CPR.

While the bill specifically states in the definition section that the impact statements are informational only, the question of the possible legal and pragmatic ramifications of providing incomplete or inaccurate information must be raised.

The CPR notes that Section 3 of the bill amends Section 14-4-5 NMSA 1978 and adds a new Subsection C that waives the requirement for an impact statement for orders or statements of policy. Certain "orders" are already exempted in the statutory definition of rule. Other "orders"

or "statements of policy" qualify as rules only if they affect a person or persons including other agencies outside the originating agency. It is the effect of an issuance, not what it is called, that qualifies it as a rule. If an order other than those exempted in statute or statement of policy affects other parties, then it is a rule and must be filed as such, regardless of what it is called. Why should the requirement for an impact statement be waived based on nomenclature rather than content and effect?

ED provided the following:

Requiring submission of an RIS prior to rulemaking and at the conclusion of rulemaking may undermine the executive's ability to promulgate appropriate rules. The information required places a burden on agencies that do not have the information or do not have the expertise to obtain the information. In particular, it could be difficult to gather such information prior to the rulemaking where substantive evidence is presented.

Although there is a hardship exception for such circumstances, the agency's claim of hardship could create litigation opportunities for those opposing the rule. For example, claims that an agency's hardship explanation is insufficient could be made.

Similarly, the agency's RIS analysis could create litigation opportunities for those opposing the rule, similar to claims seen in the context of requiring Environmental Impact Statements under the National Environmental Policy Act. For example, claims that an agency's analysis on one or more factors is insufficient could be made.

Some of the type of information proposed in HB 22 is currently required to be considered during rulemaking before the Water Quality Control Commission and Environmental Improvement Board. Each body is required to consider potential injury to health, welfare, animal and plant life, property and the environment; the public interest, including the social, economic and cultural value of the proposed activity; and the technical practicability and economic reasonableness of the proposed action. Therefore, social and economic considerations are accounted for during the substantive rulemaking.

HB 22 could undermine executive agencies' ability to promulgate rules in the public interest.

RLD states that the requirement for a regulatory impact statement on regulations that are not controversial will have no added value to the process and are a waste of taxpayer dollars. For controversial regulations, the RLD says that they already look at the impact on the affected public and presents this information in its rulemaking hearings. Formally putting this information in statute will require the agency to hire professionals to draft legally defensible regulatory impact statements.

RLD believes that a regulatory impact statement will chill rulemaking for state agencies. Some rulemaking is necessary for implementation of federal programs within the state. RLD proposes rules to boards and commissions that oversee many professions and most of the rules are geared to protect the public. The rules provide a minimum standard of conduct for many professionals and allow the industry to police itself. The same is true for the construction industry. New regulations are necessary as the construction industry continues to modernize and grow.

DOT states:

This bill will require an agency to identify, prior to public hearing on a proposed rule, any individual persons, as well as business entities, associations, etc., that will be affected by the rule, both positively and negatively, in terms of economic, social, environmental and any other relevant impacts. The DOT engages in activities on a statewide basis, and depending upon the scope of the proposed rule, this could be a nearly insurmountable task that will require significant time and expense, and perhaps the hiring of various consultants, in attempts to comply with the RIS requirements.

The scope of the RIS as defined in this bill is very broad and requires a lot of detailed information. However, it will require significant speculation by an agency at the front-end of the rulemaking process. Prior to public hearing, an agency will most likely be able to identify general populations of persons and businesses potentially impacted by the rule, and could generally describe the anticipated positive and negative impacts upon those persons. However, it is the public comment and input during the public hearing portion of the rulemaking process itself that adds value to the process and helps the agency to better formulate the rule's impact and possible alternatives.

According to PED, the bill adds additional bureaucracy to the already lengthy rulemaking process including additional record keeping and reporting requirements. It requires an analysis by each agency of the items required to be in the statement. Rulemaking already has a "public component" in that all rules, including amendments, must be noticed in the New Mexico Register and be subject to public input at a public hearing. It is not unusual, at least for the PED, to have one or more publicly noticed rulemaking hearings where fewer than five people attend and few comments are made regarding a proposed rule. This bill will impede the rulemaking capabilities of an agency.

EMNRD provided the following:

Preparing, maintaining and distributing RISs will increase state bureaucracy and administrative costs. Some of the information that state agencies will be required to provide in a RIS will require studies and research. Conducting studies and research will increase administrative expenses for state agencies. State agency employees will need additional time to prepare the RIS. Preparing the RIS will prolong the rulemaking process. There will be costs associated with maintaining the RISs and making sure that the documents are distributed to the appropriate governmental officials at the required time.

The bill will allow for legal challenges to rule changes based on a failure to comply with the RIS requirements. A rule can be challenged either as not valid or enforceable under Section 14-4-5(A) or as enacted "not in accordance with law" under Section 39-3-1.1(D) based on a claim that the RIS is inadequate or incomplete. The RIS requirements are fairly general and subject to varying interpretations by the courts. Also subject to review will be a decision by an agency to forego preparation of an RIS due to hardship or other reasons listed in Section 4(B) of the bill. In addition, while the statement "to be used for informational purposes only" in Section 14-4-2(C) seems to imply that the agency is not required to use the RIS in its ultimate decision on the proposed rule, a court may find otherwise.

The bill makes no distinctions among the wide range of rules that are proposed by state agencies each year. Thus, a proposed rule change that makes only technical corrections to existing rules will trigger the same RIS as a proposed rule that has huge impacts on the citizens of the state. The hardship exemption is related more to the resources of the rulemaking agency and may actually be more relevant to larger rulemakings.

HB 22 is not very clear on what is required. For example, how detailed must a RIS be? Also, a state agency will be subject to challenge based on the adequacy of the report. If the courts determine that agencies must provide expert analyses to comply with the RIS requirements, then agencies will be forced to hire, or contract with, economists, sociologists, demographers and other necessary experts.

ADMINISTRATIVE IMPLICATIONS

The CPR will have to develop the style and format requirements and promulgate them as rules, offer training on the requirements and ensure compliance with them. The agency currently provides on-line training on style, format and filing requirements for rules. This training will likely need to be expanded and new instructional materials developed to cover the same issues with respect to the impact statements. Further, presumably some type of style and format compliance review by Commission analysts will be needed. Currently, all rules filed must be reviewed for compliance with style and format requirements. This is an in-depth review to ensure that not only are the basic structure and formatting requirements met but that the electronic versions are clean and contain no hidden coding that hamper electronic publication. Since there is no requirement for publication of the impact statements themselves and no explicit requirement for an electronic copy, an impact statement compliance review will not be as extensive as that for a rule; however, without some review, the standards will be ineffective.

The CPR currently has three positions for analysts, but one is vacant and expected FY 12 budgetary limitations may well preclude filling it in the foreseeable future. In order to advise all filing agencies, to review all rules for compliance with style and format requirements and to handle the majority of the proofing of the NM Register and the updates to NM Administrative Code, the CPR will also have to develop both the process and means of filing and retaining the documents, and it will have to maintain the mandated lists and provide, at a minimum, public access to the specified list.

Without additional staff to prepare regulatory impact statements, rulemaking will grind to a halt. The regulations that are in place now will remain in place. Even repealing a rule will require the added expense of a preparing a regulatory impact statement. The new Governor's directive to review all rules and repeal any that are unnecessary will require a regulatory impact statement be prepared.

If HB 22 is adopted without associated funding, RLD may not be able to keep up with the rulemaking requirements for the licensing and construction industries. This is especially true if the latest national rules are required to be implemented. As a result, some of the industry standards may not be up-to-date in New Mexico. Additionally, if staff is pulled away from their licensing or construction inspection duties to prepare regulatory impact statements, licensing or inspections may be delayed. Similarly, if staff is pulled away from license investigations, public safety may be affected.

CONFLICT/RELATIONSHIP

During the 2010 interim, an Administrative Procedures Act Task Force met to review the proposed model state Administrative Procedure Act. The task force made recommendations regarding the amendment of the rulemaking process in the State Records Act, reflected in SB-30.

HB 22 conflicts with Senate Bill 30 as follows:

- Both bills add a definition for “rule” and “rulemaking” but define the terms differently.
- Both bills amend the format, filing and distribution section with different wording.
- Section 3 of HB 22 conflicts with Section 14 of SB 30. Each bill amends Section 14-4-5 NMSA 1978 in a different manner. The language is being amended and augmented in HB 22 but is being deleted in SB 30.

The task force also recommended that an Administrative Hearing Office be created, which has been introduced as SB-67, Administrative Hearings Act.

TECHNICAL ISSUES

HSD notes that a draft regulatory impact statement including public comments is required to be filed along with the proposed rule. The proposed rule is filed before the public comment so this requirement should be deleted for the draft regulatory impact statement.

The CPR provided the following:

In Section 1 of the bill, the definition of regulatory impact statement is extensive and appears that it may contain substantive law, which may be better placed in Section 4 of the bill. Specifically, the content of the regulatory impact statement listed in the definition may be located with the other requirements for drafting a regulatory impact statement found in Section 4.

The provision for emergency rules found in Section 3 highlights an issue that could place the CPR and issuing agencies in difficult positions. There has been some question over the validity of a section of a rule if that section is amended through an emergency rule action and the emergency amendment is not published as required within the 30-day period. If the amendment is not published, is the affected section or sections effectively repealed or does the section or sections revert to the original text? The CPR has to date successfully encouraged agencies to publish emergency rules, so the question has been avoided. The addition of the impact statement requirement to the existing publication requirement for continuation of emergency rules may bring the issue to the forefront. The CPR will need legal guidance if the impact statement was not filed.

EMNRD suggests the following amendments:

- On page 5, line 6, insert after “procedures”: “and no later than the publication of notice of a proposed rulemaking in the New Mexico register”.
- On page 5, line 9, insert after “hours.”: “The draft regulatory impact statement shall include the information listed in subsections (C)(1) through (C)(6) of Section 14-4-2 NMSA 1978.”

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- On page 5, lines 9 and 10, delete “of notice of a public hearing on a rule” and insert “when notice of a proposed rulemaking is published in the New Mexico register and elsewhere”.
- On page 5, line 22, insert after “statement”: “and include the reasons with any rule filed with the records center”.
- On page 5, line 7, delete “prepare” and insert “make” and on line 8, delete “and make the document”.
- On page 5, line 14, delete “prepare a final regulatory impact statement and”.
- On page 5, line 11, delete “public announcement” and insert “statement”.

ALTERNATIVES

TRD notes that this bill will add administrative requirements that will potentially delay the development of new regulations by TRD while at the same time diverting resources from other tasks. TRD suggests administrative impacts will be lessened if the proposed requirements were limited to “major” rulemakings. Major could be defined as those rules affecting large numbers of taxpayers or those with a potentially large impact on each taxpayer affected.

POSSIBLE QUESTIONS

Why is the PRC exempted from the requirements in this bill?

DW/mew:svb:bym