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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/11

SPONSOR Hall LAST UPDATED \_\_\_\_\_ HB 69

SHORT TITLE Legislative Review Act SB \_\_\_\_\_

ANALYST Daly

Conflicts with SB 30 and SJR 3  
 Relates to HB 22, SB 91 and HJR 3

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	NFI	NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Taxation & Revenue Department (TRD)  
 Education Retirement Board (ERB)  
 Commission on Public Records (CPR)  
 Board of Examiners for Architects (BEA)  
 Regulation & Licensing Department (RLD)  
 Public Regulatory Commission (PRC)  
 Medical Board (MB)  
 Gaming Control Board (GCB)  
 State Racing Commission (SRC)  
 Department of Game & Fish (DFG)  
 Energy, Minerals & Natural Resources Department (EMNRD)  
 Aging & Long Term Services Department (ALTSD)  
 Office of the State Engineer (OSE)  
 Human Services Department (HSD)  
 Department of Health (DOH)  
 New Mexico Environment Department (NMED)  
 Health Policy Commission (HPC)  
 Children, Youth & Families Department (CYFD)  
 Parole Board (PB)  
 Department of Public Safety (DPS)  
 Department of Transportation (DOT)

## **SUMMARY**

### Synopsis of Bill

House Bill 69 proposes the Legislative Review Act, which would authorize the Legislature to review, amend or repeal any new rule or amendment to an existing rule adopted by any state agency, board or commission. The process begins by a request from the specified legislative officer or body for a copy of a new rule or amendment to an existing rule from the State Records Center, along with a statement setting forth certain information including an explanation of the rule or its amendment prepared by the state agency, board or commission that promulgated the rule or amendment (which statement is a new requirement under this bill).

Upon request of any member of either house, the rule or amendment and its accompanying statement is referred to the appropriate standing committee. The standing committee must report on the rule or amendment by the 13<sup>th</sup> day of the session in odd-numbered years and the 15<sup>th</sup> day in even-numbered years. If the committee does not report by that time, the rule or amendment is deemed approved by the Legislature.

If the committee timely reports and finds that the rule or amendment is violative of the legislative intent of the statutory authority under which the rule is made, the committee may introduce a concurrent resolution repealing or amending the rule. If the concurrent resolution is adopted by the Legislature, the rule is repealed or amended accordingly. Until such repeal or amendment, any properly promulgated rule shall be in force.

## **FISCAL IMPLICATIONS**

This bill sets out a specific procedure by which the legislature could amend or repeal a rule promulgated by an agency, board or commission in the event the rule or amendment violates legislative intent of the underlying law. Since the legislature has existing authority to adopt new laws or amend existing law in order to address that same concern, the fiscal impact of legislative action under this bill (the costs incurred by the agency, board or commission needing to enact a new rule, or amend an existing rule in light of a legislative amendment or repeal) assuming it passes constitutional muster would be the same as that under existing law if the legislature amended the substantive law in a manner that required additional rule-making. Although an agency, board or commission may need to prepare a statement and some copying fees as required by Section 2(D) in the event the legislature begins a review process under the bill, it would appear that those costs could be covered by the rulemaker's existing budget.

## **SIGNIFICANT ISSUES**

Ten of the 22 agencies analyzing this bill question whether this bill violates the New Mexico Constitution. They argue that HB 69 appears to be contrary to separation of powers under the New Mexico Constitution. Under Article III, section 1 of the Constitution, New Mexico recognizes and enforces a strict separation of powers among the 3 branches of government. New Mexico courts have found that this provision generally bars one branch of government from performing a function reserved for another branch of government. The power to adopt rules is housed in the executive branch. After a public process and based on a record, the agency adopts rules, which are then subject to review by the judicial branch. The courts may overturn a rule if it conflicts with statutory law, if the agency failed to follow the law governing adopting the rule or if the agency's action is arbitrary, capricious or not supported by the agency record.

If the Legislature assumes the authority to overturn a rule in the manner authorized in this bill, the roles of the other branches might be unconstitutionally diminished: the executive branch would no longer be ultimately responsible for promulgating the rules, and the judicial branch would no longer be ultimately responsible for determining the propriety of that promulgation.

CPR reports this separation of powers issue also came to its attention during that agency's participation in the work of the Uniform Law Commission on a Model State Administrative Procedures Act.

Further, legislative action by means of a resolution, as set out in the bill, does not appear to be consistent with the constitutional requirement that every law is to be enacted as bill, and every bill passed by the legislature must be approved by the governor before becoming law. N.M. Const. art. IV, sections 15 and 22.

Many agencies also note that the legislature already has the power to pass a bill which, if signed by the governor, would make more explicit the intent of the legislature and replace an agency rule that the legislature believes violates the intent of the underlying law. This process obviates the need for this legislation.

DGF notes that its rules for various cycles regulating hunting, fishing, trapping, use of game commission lands and numerous other matters, including changes in harvest numbers or other concerns, are usually promulgated well before a specific season to allow for an application and fee process. DGF believes a "grandfathering" provision is necessary so that members of the public who have already applied for and obtained recreational opportunities under a rule during that particular license cycle.

HSD and DOT express concern that agencies may face unexpected costs, sanctions, decertification of systems or loss of funding from the federal government if the legislature amends or repeals rules that are necessary for the agencies to operate programs funded using federal monies.

## **PERFORMANCE IMPLICATIONS**

CPR notes that one of its key performance measures under the Accountability in Government Act concerns the time lag between a rule's effective date and its on-line availability in the NM Administrative Code. Another relates to the online availability of the NM Register by established publication dates. Given this agency's additional responsibilities under this bill, including transmitting materials to the legislature and perhaps formatting and filing any amendments or repeals under this bill, CPR expresses concern about its ability to met these and other performance targets.

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

HB 69 relates to HB 22, SB 91 and HJR 3, which all deal with rules and rulemaking. Subsection D of Section 2 of HB 69 conflicts with Section 8 of SB 30 because both require statements to be filed with rules, but the content of those statements are different. HB 69 conflicts with SJR 3, which seeks to amend the state constitution to allow legislative overturn of a agency rule upon a 2/3 vote of each house.

## **TECHNICAL ISSUES**

Section 2C does not specify how either legislative body would request a rule to review; in contrast, section 2B specifies such request is made through the chief clerk of the requesting house.

Section 2C refers only to rules adopted by an agency, and any confusion concerning its applicability to those adopted by boards and commissions could be remedied by adding those two terms, if that is the intent.

Section 2D requires the promulgating agency “enumerate” each rule, which term is confusing and further clarification may be helpful in implementing the bill.

The bill does not address which agency would be responsible for formatting and filing any amendment or repeal enacted by the legislature under this bill.

## **OTHER SUBSTANTIVE ISSUES**

In light of the time constraints set out in the bill, it appears that new rules and amendments adopted after July 1, 2011 would have to be requested before the next regular session for possible action at that session, but rules adopted previous to that date could be requested at any time and considered at any session. The lack of a timeframe on extant rules may lead to confusion in implementation.

CPR notes that the separate statement requirement in Section 2(D) may already be addressed in one of its existing rules which requires a transmittal form that must accompany the filing of a rule that contains in abbreviated form much of the information that would be required in the statement.

Several agencies have noted the “sufficient copies” requirement for a requested rule or amendment and its accompanying statement in Section 2(D) could result in large amounts of copying and printing costs if it means that copies must to be made for all 112 members of the legislature.

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

Agencies would adopt and amend rules as currently provided by statute. Persons who believed a rule or amendment exceeded an agency’s statutory authority or otherwise violates state law would continue to be able to challenge the rule or amendment in court. Additionally, the legislature would continue to be able to enact amendments or a new law clarifying the intent of the statute under which a rule was enacted if the legislature was dissatisfied with an agency rule or amendment.

MD/bym