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F I S C A L   I M P A C T   R E P O R T

ORIGINAL DATE 02/24/11
SPONSOR Sanchez, B. **LAST UPDATED** 03/12/11 **HB**

SHORT TITLE Agency Citation of Rulemaking Authority **SB** 235/aSRC

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates HB 345, as amended
Conflicts with HB2, HB 84, HB 157, HB 360, HB 409 and SB 30
Relates to SJR 3, HB 69 and HJR 3

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Taxation and Revenue Department (TRD)
General Services Department (GSD)
Regulation & Licensing Department (RLD)
Commission of Public Records (CPR)
Energy, Minerals & Natural Resources Department (EMNRD)
New Mexico Environment Department (NMED)
Department of Transportation (NMDOT)
Public Education Department (PED)

SUMMARY

Synopsis of SRC Amendment

The Senate Rules Committee amendment strikes the word "specific" preceding and the phrase "regarding the content of the rule" following the phrase "specific statutory authorization" throughout the bill. As a result, the particular commission, secretaries and departments identified in the bill may adopt rules only upon statutory authorization and must cite that statutory authorization when so adopting.

Synopsis of Original Bill

Senate Bill 235, introduced on behalf of the Economic and Rural Development Committee, amends the Executive Reorganization Act and laws to add language requiring particular departments to cite the specific statutory provisions warranting any rules promulgated, adopted or amended by those departments, and that rules may only be adopted upon specific statutory authorization regarding the content of the rule.

The Departments affected are the Public Regulation Commission (Section 8-8-4 NMSA 1978), the departments under the Executive Reorganization Act (Section 9-1-5 NMSA 1978), Children, Youth and Families Department Act (Section 9-2A-7 NMSA 1978), Corrections Department (Section 9-3-5 NMSA 1978), Cultural Affairs Department (Section 9-4A-6 NMSA 1978), Department of Finance Administration (Section 9-6-5 NMSA 1978), Department of Health (Section 9-7-6 NMSA 1978), Department of Environment (Section 9-7A-6 NMSA 1978), Human Services Department(Section 9-8-6 NMSA 1978), Economic Development Department (Section 9-15-6 NMSA 1978), Tourism Department(Section 9-15A-6 NMSA 1978), Regulation and Licensing Department(Section 9-16-6 NMSA 1978), General Services Department (Section 9-17-5 NMSA 1978), Public Safety Department(Section 9-19-6 NMSA 1978), Indian Affairs Department(Section 9-21-6 NMSA 1978), Aging and Long Term Services Department(Section 9-23-6 NMSA 1978), Public Education Department (Section 9-24-8 NMSA 1978), Higher Education Department (Section 9-25-8 NMSA 1978), Workforce Solutions Department (Section 9-26-6 NMSA 1978), and the Homeland Security and Energy Management Department (Section 9-28-4 NMSA 1978).

Throughout the bill, all references to "regulation" are replaced with "rule."

For all agencies covered by the bill other than the PRC, the bill would eliminate existing bond requirements for the secretary, division directors and employees and officials deemed necessary by the Secretary and eliminate departmental obligations to pay for such bonds.

The bill also amends the State Rules Act to eliminate "statement of policy" from the definition of "rule" and removes bracketed references.

As to the named agencies, the bill adds language stating that the statutory language granting rulemaking authority or generally describing the powers and functions of the department shall not be construed to extend further than implementing or interpreting the specific powers and duties conferred by the enabling statute. It also clarifies that, other than for the adoption of reasonable procedural rules as may be necessary to carry out its duties, every rule the agency adopts shall cite the specific statutory provisions warranting the rule being promulgated, adopted or amended, and that those rules may be adopted only upon specific statutory authorization regarding the content of the rule.

SB 325 also amends the covered departments' enabling acts to substitute gender neutral references for the secretary or superintendent; to remove references to "regulation", leaving and sometimes substituting "rule" in its place; and to eliminate bracketed terms.

FISCAL IMPLICATIONS

The CPR reports that there should be no fiscal impact on any of the covered agencies since the provisions of the bill relating to rule making are already either standards of rule making (that

rules can only be made within statutory parameters) or requirements that the CPR imposes on filing agencies (citing statutory authority). However, the bill could have the effect of slowing rule making, which, in turn, could adversely impact revenue generated by publication in the NM Register.

SIGNIFICANT ISSUES

The CPR raises these issues:

- Title sufficiency. There would appear to be a constitutional problem with the title of the bill and the substantive deletion of the language relating to surety bonds in various statutes being amended. Whatever the rationale for the deletions, the title only relates to rule making. Article 4, Section 16 of the NM Constitution provides *The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws****; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void.***

  *The reason for the deletion of the surety bond language is not known. It might be an attempt to conform requirements for cabinet secretaries and division directors to other statutes relating to some of the newer cabinets, which do not contain surety bond requirements. Since the bill does not address all cabinet departments, it may leave intact the surety bond requirements of those not affected, although the amendment to the Executive Reorganization Act removing the requirement might be read to cover all departments. If so, then amendments to that Act, including the amendments relating to rule making, would seem adequate. Nonetheless, if the title sufficiency issue raised above is valid, then the intent is irrelevant.

- A defining aspect of administrative law is that a rule must be made pursuant to statutory authority – that it cannot be used to expand statutory authority. It is true that in New Mexico there is no centralized entity responsible for ensuring that rules are made subject to explicit authority of, and within the confines of statutes; the responsibility for that lies with the legal counsels, whether in-house or assigned, of the individual rule-making agencies. However, it is a point that is made in the CPR's NMAC training and something of which legal counsels involved in rule-making should be aware.

- Additionally, the CPR requires that all rules filed with it pursuant to the State Rules Act cite the statutory authority for the rule. It is a mandatory section in each rule. The CPR also requires that the statutory authority for both the specific rule and the statutory authority giving the individual or entity the rule-making authority, if different, be cited on the requisite rule transmittal form.

- The intent behind amending of statutes governing the powers and duties of secretaries of some but not all cabinet departments is not clear.

- It should be noted that the bill affects only cabinet departments and the PRC, not the myriad of other rule-making entities.

According to the AGO, the addition of language restricting agency promulgation, adoption or amendment of rules to the power granted by the legislature simply restates the existing common law rule that an agency may not craft rules outside the power delegated to it. Alexander v Anderson 126 NM 632(1999). However, the language restricting "construction" to the specific powers and duties conferred by the enabling statute could be seen as restricting the power to craft rules to the exact language of the enabling act, conflicting with the common law rule that the agency's authority is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication. Howell v. Heim 118 N.M. 500 504 (1994); Winston v. New Mexico State Police Board 80 N.M. at 311(1969). See also, Morrow v. Clayton, 326 F.2d 36 (10 Cir. 1963) and United States v. Pennsylvania R. R. 323 U.S. 612 (1945), noting that a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom. Imposition of such a restriction may invoke due process challenges.

The NMDOT offered the following discussion of the bill:

> The NMDOT currently has 41 rules promulgated under its general or specific rulemaking authority. Those rules encompass a variety of issues and activities that relate to or impact third parties and the general public, such as: utility right of way easements; leases of real property; vending in rest areas; removal of encroachments, obstructions and abandoned vehicles from NMDOT right of way; traffic safety; temporary closings of state highways; traffic control; height, length and weight limitations; highway contracting and bidding; design standards; and aviation related regulations.
>
> Some of these regulations have specific statutory authority for the subject matter of the rules; others have been promulgated under the general powers and rulemaking authority of NMDOT. Some rules are federally mandated. All of the regulations impact on some level design and construction standards and/or the safety of the traveling public. If NMDOT is limited to promulgating or amending only those rules specifically authorized by statute, its ability to adequately regulate the activities of outside entities and persons, as one means of fulfilling NMDOT's responsibility of providing safe and efficient transportation systems for the public, will be impaired.
>
> In addition, these rules are applied to third party entities or persons to effectuate particular programs or to address identified issues or needs. The rulemaking process provides an opportunity for those impacted persons to provide input and feedback prior to implementation of the rule. Without such rules, there may be inconsistent application of NMDOT requirements or processes. The rules ensure uniformity and equitable application to all impacted persons.

Similarly, the EMNRD comments:

> Many statutes provide broad authority to agencies to adopt rules necessary to implement an act. For example NMSA 1978, Section 12-6-12 provides that the "[t]he state auditor shall promulgate reasonable regulations necessary to carry out the duties of his office, including regulations required for conducting audits in accordance with generally accepted auditing standards". If courts interpreted SB 235 to require that an agency's statute authorizing rule-making specify in detail what the rules may contain, the

> Legislature would need to amend numerous statutes that currently do not contain those details to provide specific direction to executive agencies and specify what the rules may contain in order for the agency to implement the act as adopted by the Legislature.

The PED points out:

> If adopted this bill would for all intents and purposes prevent the listed public bodies from engaging in rulemaking unless and until they are requested the Legislature to enact a law giving them content-specific rulemaking authority.
>
> An unintended consequence of the bill is that it would also prevent pubic bodies that received and administered federal funds from adopting rules required by federal mandates to carry out their federal mandates. This could result in the loss or reversion of federal funds, or in negative audit findings by federal auditors.
>
> Also, if a public body has a statutory duty to provide due process to members of the public applying for or receiving state benefits, licensure, permits or other considerations, this bill would prevent that body from adopting rules implementing due process/application procedures unless their enabling law so specified.
>
> The bill also does not address the situation where a public body enacted a rule under general rulemaking authority and now seeks to amend its rule and whether even amending an existing rule would be prohibited absent a content-specific law permitting the rulemaking.
>
> By requiring public bodies to go to the Legislature to obtain content-specific legislation prior to rulemaking, the bill puts the Legislature in the business of micromanaging all public bodies. As such, the bill does not promote an effective or more efficient government, instead impeding its smooth operation.

The NMED suggests:

> Apart from the Secretary, who will be stripped of the power to adopt regulations to carry out the duties of the Department and its divisions, SB 235 will little impact on the Department's rulemaking procedures because the boards and commissions (such as the EIB or the WQCC) that do most of the substantive rulemaking for the Department are not addressed by this bill.

Similarly, the RLD notes that SB 235 only applies to specific agency rulemaking and not to the numerous licensing and other boards and commissions that do most of the substantive rulemaking in New Mexico.

Eliminating surety bonds in the Executive Reorganization Act may not sufficient to overcome the requirements of the Surety Bond Act.

PERFORMANCE IMPLICATIONS

The PRC states that as far as the PRC Act is concerned, the proposed amendment tracks what the Public Regulation Commission already does, either pursuant to the Public Regulation Commission Act, NMSA 1978, § 8-8-1, et seq., or pursuant to its procedural rules as codified at 1.2.2 NMAC.

CONFLICT, DUPLICATION, RELATIONSHIP

HB 22, HB 360, HB 409 and SB 30 conflict with this bill: all of these bills propose to amend Section 14-4-2 NMSA 1978.

HB 345 as amended duplicates this bill.

SB 235 relates to HB 69, HJR 3 and SJR 3, all of which make changes to the rulemaking process.

SB 235 also conflicts with a number of bills that amend the Executive Reorganization Act as part of a plan of government reorganization (e.g. HB 84, HB 157).

TECHNICAL ISSUES

The TRD observes the bill amends certain statutory provisions to require that any rule making contain the statutory provision for the rule. These amendments appear to be redundant since the bill itself contains a new provision, Section 22, imposing the requirement on all the executive agencies.

The EMNRD points out that in Section 22, which amends the State Rules Act, the term "department" appears on line 13 of page 91 but the term "agency" appears on lines 16, 19, and 20 on page 91. That Act defines the term "agency" to mean "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government". The term "department" on line 13 on 91 should be changed to agency.

OTHER SUBSTANTIVE ISSUES

In Section 21(C), the CPR would prefer to see the term "statement of policy" retained. The definition of rule in the State Rules Act and the determinations contained in Attorney General Opinion 93-1 basically hold that a rule is defined not by what it is called but what effect it has – if something affects or purports to affect any person or agency outside the issuing agency, then it is a rule absent a specific statutory exemption. The deletion of "statement of policy" could lead, once again, to agencies attempting to circumvent the rule-making process by calling something a "statement of policy" even if affects those outside the agency.

The NMDOT states it is required under the Public Mass Transportation Act, NMSA 1978, §67-3-68, to use all functions and powers as necessary to develop a coordinated program with the United States government and others, in the field of mass transportation. To accomplish this goal, the Public Mass Transportation Act is statutorily mandated to be liberally construed. A restriction on NMDOT's rulemaking authority in this context would be contrary to law as currently written.

WHAT ARE THE CONSEQUENCES OF NOT ENACTING THE BILL

The CPR notes that requirements contained in the rule making-related amendments would not be codified; however, most would continue in effect pursuant to administrative law, AG opinion or judicial decision.

MD/bym:svb