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FISCAL IMPACT REPORT

ORIGINAL DATE 01/30/12
LAST UPDATED 02/03/12 **HB** 34/aHHGAC

SPONSOR Gentry/Keller

SHORT TITLE Rulemaking Requirements **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY12 | FY13 | FY14 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------------|
| Total | | * | * | * | Recurring | General Fund et al. |

(Parenthesis () Indicate Expenditure Decreases)

*It is not possible to quantify the fiscal impact of the bill, so costs are indeterminate, but several agencies assert additional costs and operating expenses. See Fiscal Implications below.

Relates to HB 17.

SOURCES OF INFORMATION

LFC Files

Responses Received From

NM Department of Agriculture (NMDA)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Taxation & Revenue Department (TRD)
 Public Employees Retirement Association (PERA)
 Commission on Public Records (CPR)
 Energy, Minerals & Natural Resources Department (EMNRD)
 Office of the State Engineer (OSE)
 Human Services Department (HSD)
 Department of Health (DOH)
 Medical Board (MB)
 New Mexico Environment Department (NMED)

SUMMARY

Synopsis of HHGAC Amendment

The House Health and Government Affairs Committee amendment to House Bill 34 includes political subdivisions in the definition of “person”, which allows their participation in the

rulemaking process. The amendment also adds an exemption to the provisions contained in Section 9 (B) regarding the adoption of an emergency rule when another statute requires an agency to comply with more specific requirements when promulgating emergency or interim rules.

Synopsis of Original Bill

House Bill 34 provides detailed, uniform procedures for the state agency rulemaking process. It amends the State Rules Act to include requirements for agencies to provide:

- an annual regulatory agenda of the rules it expects to promulgate in a fiscal year;
- a preliminary outline of a proposed rule prior to public notice;
- a rule drafting committee, if appropriate, to draft a rule;
- more comprehensive public notice;
- the minimum requirements for public participation and comments during the rulemaking;
- a rulemaking record available through the sunshine portal; and
- a concise explanatory statement for the agency's reasons for adopting the proposed rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments.

The bill allows a limited option for emergency rules, limits the ability of an agency to change a proposed rule before filing and establishes time limits for the adoption of a rule change.

HB 34 also amends existing sections of the Act to definitions necessary for the rulemaking process and to coordinate the new process with existing rule filing requirements.

FISCAL IMPLICATIONS

Seven agencies report no or minimal fiscal impact if this bill is enacted into law. However, four anticipate greater impact.

CPR reports that because it would have to maintain the concise explanatory statements that must be filed with rules, it would have to develop both the process and means of filing and retaining those documents. That process would result in continuing costs, although those costs are difficult to determine. CPR also notes that the explanatory statements filed with the records center would be public documents and will require the agency to develop a means of providing ready access. Both physical retrieval and on-line posting would involve additional and perhaps significant staff time and resources. In FY 11, the agency published 453 rules in the register for 55 agencies; based on these numbers, CPR advises that it will need at least another .25 FTE dedicated to managing these statements. Lastly, CPR reports that existing on-line training on style, formatting and filing requirements would need to be expanded and new instructional materials developed to address the new requirements contained in HB 34.

According to DOH, the bill ensures litigation, particularly concerning the rights of members of the public in an agency's rulemaking process, which will increase costs. HSD anticipates a considerable increase in costs to agencies involved in rulemaking in light of the additional posting and mailing involved, as well as increases in the cost of filing rules, along with explanatory statements which are based on the columnar inch. The MB asserts that the

additional text required to be published by this bill could potentially double the cost of the rulemaking process. OSE expresses concern that agencies might not be able to handle the increased duties using current staffing. Further, it notes that rulemaking is already a lengthy, labor-intensive and expensive process, and HB 34 will only make it more so.

SIGNIFICANT ISSUES

The ENMRD provides this summary of the background, purpose and effect of this bill:

HB 34 is intended to provide a uniform process for the consideration of rule changes while increasing the opportunities for the public to learn about and participate in the rulemaking process including notice that occurs prior to any formal rule proposal. Currently, each agency has its own process for adopting rules, which may be outlined in a statute or by agency rule or policy. The Administrative Procedures Act, NMSA 1978, Sections 12-8-3 to -7, provide a basic process for adopting rule changes but these procedures apply to hardly any agencies. HB 34 will establish a process that applies to all state agencies.

HB 34 is the product of a Task Force that was formed in 2010 to investigate the feasibility of adopting uniform administrative laws, including those within the revised Model State Administrative Procedures Act. The Task Force started with rulemaking procedures and HB 34 is a result of the Task Force efforts. The Task Force, which was comprised of industry representatives, community group representatives and state agencies, presented its results to the Legislative Regulatory Process interim subcommittee.

Many of the rulemaking requirements in HB 34 are currently followed by most state agencies, but HB 34 also adds many more requirements to the State Rules Act for state agencies to follow. These include developing an annual regulatory agenda which must be updated regularly, providing a preliminary outline for a possible rulemaking before the formal rulemaking process begins, using the state's Sunshine Portal to provide information to the public, allowing the agency to use a rule drafting committee to develop consensus on rule changes and providing a written statement that explains the agency's action in adopting any rule changes. These changes increase the opportunities for the public to become aware that an agency is considering a rule change and to become involved with the process.

The NMDA supports the public participation process as it relates to agency rulemaking, and recognizes that the affected public has a major stake in changes to rules that impact them. It believes its existing rulemaking procedures provide transparency and accessibility to the public and maximizes participation, and will meet the intent of this bill.

The TRD comments that, while this bill will make rulemaking more transparent, it will also make the process more cumbersome. That agency worries that the extensive requirements established by the bill might subject rulemaking to more court challenges.

The DOH also expresses concern over the amendments proposed in HB 34, which it contends would:

impede an executive agency's ability to develop sound public policies, and would add little to the existing framework of rulemaking under the State Rules Act. The bill would require state agencies to publish notice of any rulemaking that they have contemplated, but *before* the actual rule text had even been developed or written, and would further require that executive agencies consider public comments about rules before those rules have even been drafted. It is unclear what benefit would be derived from publicizing and soliciting public comment regarding rules that have not yet been written. It is also unclear what advantage such a process would confer to the rulemaking process under the existing State Rules Act, which already provides the ability of state agencies to incorporate changes to proposed rules based on public input.

HB34 proposes that if an executive agency creates a committee for rule drafting, it must comprise that committee of persons who will represent the various interests of members of the public. By requiring that the rule-drafting committee represent the opinions of members of the public, the bill proposes to radically alter the way that executive agency rules are created. It also provides for alternative dispute resolution during the agency rulemaking, presumably with the intention of allowing members of the public who are displeased with the direction of an agency's proposed rule to contest it; but the bill does not explain what the consequence of such dispute resolution would be in terms of the agency's ability to carry forward in promulgating the rule, or what power the arbiter in the ADR process would have with respect to agency rule creation. By vesting ambiguous rights in the public with respect to an agency's proposed rulemaking, the bill virtually guarantees protracted and expensive litigation, particular in those cases where an agency proposes a rule that is controversial.

According to OSE:

Repeal of the savings clause of Section 14-4-5.1 would mean that many sets of agency rules, possibly in place for decades, would become invalid. That would create a regulatory vacuum in which agencies might have no legal mechanism for conducting their statutory duties.

For the OSE, two sets of regulations would possibly become invalid: the regulations pertaining to underground water and one set of regulations creating procedures for administrative hearings on protested and aggrieved water transaction applications. These regulations are relied upon to process applications for permits for water right owners and to conduct hearings on protested or aggrieved applications. Repeal of Section 14-4-5.1 would create havoc in administering water rights, at least until new regulations could be enacted. The stay on agency rulemaking by executive order, which will be heard before the Supreme Court on January 26, creates even more uncertainty as to replacing agency procedures that have been invalidated.

Finally, there is an excellent possibility that this section of HB 34 would generate

legal challenges to the invalidation of any rules that were legally promulgated at the time they were put in place. This repeal has the potential of raising many legal issues, including separation of powers claims. There does not appear to be any legal necessity for such a repeal and the problems such a repeal will create mitigates against doing so.

Additionally, OSE advises that since HB 34 does not repeal statutes specific to particular agencies' rulemaking authority, notice requirements, or processes for promulgation, the agency-specific statutory provisions would control over the more general provisions of this bill if it is enacted.

The AGO expresses these concerns:

First, there is some question as to whether this is the proper place to define rule making. The current intent of the State Records Act centers around the publication of state rules. Rule making is not a focus of the State Records Act, and has not been since its inception. If the intention is to define rule making more fully, as HB 34 attempts to do, it may be that another place in the law is more appropriate. The Administrative Procedures Act ("APA"), [12-8-1](#) to [12-8-25](#) NMSA 1978, for instance, already provides a framework for rule making, and may provide better placement for such changes. However, currently the APA is applicable only to certain agencies and if the intention is that all agencies provide rule making in the way that HB 34 contemplates, then the APA must be changed to apply to all state entities, or the rule making portions of the APA must be changed to reflect that HB 34's mandates apply to all state entities.

Further, in terms of the new material itself, HB 34 would require that the relatively exacting rule making requirements start again, if the variance between the proposed and final action is great enough that the change is not a "logical outgrowth of the action proposed in the notice." This may make rule making process difficult and/or expensive for state entities.

Finally, the CPR points out conflicts between HB 34 and the Uniform Licensing Act (ULA): section 61-1-29 of the ULA requires a board to make reasonable efforts to give notice of rulemaking, while these amendments require more specific actions; and the 180 day duration of emergency rules set in Section 9(D) of the bill is inconsistent with the 120 day limit set in section 61-1-30(A) of the ULA. The CPR also questions the legal implications of the concise explanatory statement that must be filed upon adoption of a rule, such as whether an agency would be limited to the content of the statement in defending rules or amendments on appeal.

The MB points out its rule revisions generally relate to technical or clarification issues where typically consensus from the persons impacted has been achieved, and the public health, safety and welfare has been considered. It also comments that since rulemaking is governed by existing statutes designed to give all parties ample notice and opportunity to input, additional burdensome requirements that would delay the adoption of a rule addressing the public's welfare seems unnecessary.

PERFORMANCE IMPLICATIONS

Some agencies report no or minimal impact on performance measures. However, the EMNRD expresses concern that the additional time necessary to complete a rulemaking under this bill in rare circumstances could impact compliance with some federally funded programs that require updates in state rules to conform with federal statutory or rule changes. The HSD raises a similar concern.

The CPR notes that one of its key performance measures under the Accountability in Government Act concerns the lag time between the effective date of the rule and its online availability in the administrative code. Additionally, another internal measure relates to online availability of the register by established publication dates. An increased work load could affect that agency's ability to meet these and other performance targets.

Other agencies note the impact of reduced staffing levels in handling the new tasks required in this bill.

ADMINISTRATIVE IMPLICATIONS

The HSD notes that many of the bill's provision would be pre-empted by federal requirements as to medicaid. Additionally, the HSD would be required to distribute rulemaking information to approximately 50 field offices. This requires additional staff time and resources and, as HSD advises, may further increase and complicate already long wait times for individuals seeking public assistance such as food stamps and Medicaid or child support services in those offices.

RELATIONSHIP

The HSD advises that HB 17 requires legislative approval prior to that agency submitting for federal approval amendments to the state Medicaid plan, waivers of state Medicaid plan requirements, and revisions to existing waivers of state Medicaid plan requirements. The HSD expresses concern that HB 34 requires HSD to submit these matters to the public prior to seeking legislative approval, which would add two additional procedures to the rulemaking process as to state Medicaid matters.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Rulemaking will be governed by each agency's statutory framework.

MD/lj