

**LEGISLATIVE EDUCATION STUDY COMMITTEE  
BILL ANALYSIS**

**Bill Number: HB 571**

**51st Legislature, 1st Session, 2013**

**Tracking Number: .192718.2**

**Short Title: DFA Cost-Benefit Analysis of Agency Rules**

**Sponsor(s): Representative Cathrynn N. Brown and Senator Sander Rue**

**Analyst: Kevin Force**

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**Bill Summary:**

HB 571 proposes new sections of law, requiring the Department of Finance and Administration (DFA) to perform a cost-benefit analysis on all rules proposed by state agencies. Among its provisions, HB 571:

- directs DFA to perform a cost-benefit analysis on all agency rules, and:
  - report to the Governor and the Legislative Finance Committee (LFC); and
  - post the report on the sunshine portal;
- stipulates that if a proposed rule has an impact of at least \$500,000, the analysis shall be used for fiscal analyses and performance budgeting of the program, division, or budget line item for which the rule was proposed;
- directs DFA to consider in its analysis all verified data voluntarily submitted by interested parties, regulated persons, and nonprofit corporations whose members might be affected by the rulemaking;
- requires DFA to protect the confidentiality of all data and materials submitted for consideration in the cost-benefit analysis;
- notes that the cost-benefit analysis is a public document, and directs DFA to make the analysis available to interested and regulated persons, as well as nonprofit corporations whose members might be affected by the rulemaking at least 30 days before the required report to the Governor and LFC;
- requires DFA to note in the analysis what data were unavailable for review in preparation of the analysis;
- exempts from required analysis those rulemakings that address only technical amendments, and include no substantive effect on existing rule, but requires the pertinent state agency to submit a statement to DFA explaining why the rule should be so exempt; and
- requires DFA to perform a retroactive cost-benefit analysis of all rules that took effect after December 31, 2012, for the period encompassing the first three years after the rule's effective date.

In other provisions, HB 571 requires DFA to report the analysis to the Governor and the LFC at least six months after the third anniversary of the rule's effective date, and include in the analysis:

- the estimate of the primary benefits of the rule, including impact on:
  - consumer protection;
  - worker safety;
  - employment;
  - energy reliability;
  - the environment; and
  - business competitiveness;
- the estimate of the secondary benefits of the rule, and how the regulated conduct relates to both the primary and secondary benefits of the rule;
- the estimate of any cost savings to regulated persons, including savings from:
  - changes in existing requirements;
  - new requirements; and
  - the imposition of cumulative requirements;
- a statement of the number of regulated persons subject to the rule, classified by industry sector; and
- a comparison of:
  - the cost benefit analysis for the rule prepared for the rule’s implementation; and
  - the actual costs and benefits of the rule during the first three years of the rule’s implementation.

**Fiscal Impact:**

HB 571 does not contain an appropriation.

**Fiscal Issues:**

DFA notes that because HB 571 imposes additional requirements without removing existing obligations, it would require substantial additional resources. Moreover, as several agencies note in their analyses, it is difficult to quantify the time and effort required for a single agency to conduct cost-benefit reviews not only of all proposed agency rules, but also of adopted rules that will have become effective after December 31, 2102; however, the impact is likely to be substantial.

As noted by the Economic Development Department in its analysis of SB 533, a bill identical to HB 571, the requirements outlined in the bill may have substantial impact on the cost of doing business in New Mexico, hiring New Mexican citizens, or making capital investments in the state, if review of regulations identifies costs resulting in the amendment or withdrawal of agency rulemakings.

## **Substantive Issues:**

According to the Institute for Policy Integrity<sup>1</sup>:

- most states require some economic impact analysis of proposed rules;
- the required rigor of such analyses can vary, from simple instructions for agencies to consider possible costs, to detailed guidelines for quantification of all direct and indirect costs and benefits;
- impact analyses can help promote rationality, accountability, and transparency; and
- by requiring governments to justify their regulatory choices in the language of science and economics, cost-benefit analysis helps ensure that decisions are not made on the basis of special interest politics<sup>2</sup>.

According to DFA:

- The department currently employs two economists with a host of existing duties and ongoing requests, including regular participation in the consensus revenue group, tax expenditure reporting as required by Executive Order 2011-071, and other projects at the request of interim committees and the Governor's office.
- Many of the provisions required by HB 571 would be difficult to measure due to insufficient data, limited time and resources, and estimation limitations.
- This proposal would take substantial time and effort away from existing duties and activities, and may compromise quality.
- While the Economic Analysis Unit at DFA is the most likely source of such analyses, the economists on staff will not have the same level of institutional knowledge and expertise as the relevant agency in assessing agency rules.
- State rules can include building codes, air quality standards, tax codes, public assistance regulations, and public health regulations, to name but a few.
- There are currently 22 titles of rules under the *New Mexico Administrative Code*, with hundreds of chapters.
- Approximately 30 rules have effective dates between January 1 and January 31, 2013; if other months are similar to January, DFA could be analyzing upwards of 300 rules each year.
- The rulemaking process already includes a promulgation process designed to ensure transparency and allow stakeholder input.

The Human Services Department analysis of SB 533 notes that the time involved in preparing the analysis may result in delays in the finalization and adoption of proposed rules.

In its analysis of SB 533, the New Mexico Corrections Department (NMCD) states that, while this bill would have no direct effect on the NMCD, as it is not a rulemaking agency, there may be indirect effects caused by the delayed implementation of rules pertaining to NMCD operations.

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<sup>1</sup> The Institute for Policy Integrity is a nonpartisan advocacy organization and think-tank, sponsored by the New York University School of Law, dedicated to improving the quality of governmental decision-making.

<sup>2</sup> *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking*, Shwartz, Institute for Policy Integrity, Report No. 6, November 2010, at <http://www.senate.state.tx.us/75r/senate/commit/c510/handouts12/0410BI-IPI-RegulatoryReview.pdf>.

According to the Department of Health (DOH):

- It is unclear to what extent the cost-benefit analyses required under the bill would affect the promulgation of rules necessary to regulate programs administered by DOH.
- It is possible that regulations found to have a cost to citizens or businesses could be opposed, delayed, or reversed, with potential adverse impacts on the health of New Mexicans.
- HB 571 does not:
  - specify time frames for the analyses in relation to effective dates;
  - provide for a process for opposition to an agency rulemaking when a cost-benefit analysis indicates significant costs to those affected; and
  - require state agencies to consider the financial impact of proposed rules or make adjustments to proposed rulemakings as a result of the findings of cost-benefit analyses.

According to the analysis of SB 533 by the Energy, Minerals and Natural Resources Department (EMNRD):

- While HB 571 requires that cost-benefits analyses that identify a fiscal impact of at least \$500,000 be used in fiscal analyses and performance budgeting of the program or budget item for which a rule is proposed, it provides no guidance on *how* that analysis is to be so employed.
- The requirement that state agencies protect confidentiality of submitted data and documents according to their own rules assumes that all state agencies have such rules. Since many do not, it is unclear if the provisions of HB 571 would require the adoption of such rules.
- While HB 571 requires DFA to prepare a cost-benefit analysis, it provides neither a process by which state agencies submit proposed rules to DFA nor deadlines for DFA to complete the cost-benefit analysis.
- Presumably, cost-benefit analyses are only to be used by the LFC for fiscal analyses and performance budgeting, as HB 571 provides no process for state agencies to consider the analysis or to incorporate it into their rulemaking processes.
- It is unclear what the performance implications may be for state agencies since HB 571 does not include:
  - a time frame for when a state agency provides a proposed rule to DFA;
  - whether agencies must wait to adopt a rule until DFA has completed a cost-benefit analysis; and
  - how agencies provide verified data to DFA.

### **Technical Issues:**

According to the analysis of SB 533 by the Office of the State Engineer, the requirements that DFA and other agencies take steps to ensure protection of confidential information supplied by persons interested in the rulemaking or cost-benefit analysis may be in conflict with the *Inspection of Public Records Act (IRPA)*:

- IRPA defines “public records” as documents “received, maintained or held by . . . any public body.”<sup>3</sup>
- Cost-benefit analyses and rulemakings are public documents, subject to the act, which makes no exception from disclosure of records received by an agency that contain confidential or proprietary information.

According to DOH, HB 571 details elements required for mandated retroactive cost-benefit analyses, but the bill contains little detail regarding elements for the analyses required for new and future rules.

According to EMNRD, HB 571 requires DFA to:

- include in its analyses any verified data provided by interested parties, but does not define the term “verified data,” nor does it include any criteria for what might constitute verified data;
- perform retroactive cost-benefit analyses on all adopted rules that will have taken effect after December 31, 2012, although the use of the term “retroactive” is confusing, as what is actually required is analysis of rules that are adopted after December 31, 2012 but are effective prior to the effective date of HB 571; and
- review verified data *voluntarily* submitted from interested parties, regulated persons and nonprofits, while noting that interested parties and regulated persons are not *required* to submit such data; the bill remains silent, however, on whether nonprofits are required to provide information.

### **Background:**

In general, rules are written by the various state agencies to implement, clarify, and support the more general laws enacted by the Legislature. While each agency can have its own rulemaking procedures, all agencies must adhere to certain provisions of law regarding the rulemaking process prescribed in:

- the *State Rules Act* (Chapter 14, Article 4 NMSA 1978);
- the *New Mexico Administrative Code* (Code) (Title 1, Chapter 24); and
- Chapter 14, Article 11 NMSA 1978, regarding records, rules, notices, and oaths.

### **STATE RULES ACT**

Provisions pertaining to the authority and duties of the State Records Administrator, the Administrative Law Division, and technical rulemaking requirements are contained in the *State Rules Act*.

Authority and duties of the State Records Administrator and Administrative Law Division include:

- the publication and maintenance of the *Code* and the *Register*;
- the promulgation of rules of procedure prescribing the format, structure, and compilation of the *Code*; and
- the supplementation or revision of the *Code* at least once annually.

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<sup>3</sup> Section 14-2-6(F) NMSA 1978

NEW MEXICO ADMINISTRATIVE CODE (TITLE 1, CHAPTER 24)

Title 1, Chapter 24 of the *Code* contains rules promulgated by the New Mexico Commission of Public Records outlining technical requirements and procedures that must be followed in order for a rule to be accepted for publication in the *Register* and the *Code*. These rules include provisions stating that:

- when an agency file rules with the Administrative Law Division, they must include a transmittal form signed by the appropriate agency authority, such as the secretary of an agency;
- if a rulemaking does not conform to the clerical, technical, and formatting requirements necessary to publication, it may be rejected; and
- upon publication, emergency rules are “converted” to regular rules.

CHAPTER 14, ARTICLE 11, NMSA 1978

According to Chapter 14, Article 11 NMSA 1978, regarding notices, records, rules, and oaths, all legal notices must also be published on the agency’s website, although this electronic posting is not a substitute for the other required publication, and failure to post this information to the website is not grounds to challenge a rule’s validity. These sections also establish standards for the publication of notice in newspapers and periodicals, if required.

ADMINISTRATIVE PROCEDURES ACT AND OTHER NEW MEXICO LAW REGARDING ADMINISTRATIVE PROCEDURES

Although New Mexico’s *Administrative Procedures Act* (APA) provides the most comprehensive current procedural requirements for an agency to undertake a rulemaking, it is the least widely applicable body of law pertaining to rulemaking<sup>4</sup>. The provisions in the APA include requirements for many of the issues addressed by HB 571, such as:

- publication of notice and public comment;
- agency review of public input and other materials; and
- emergency rules.

One statutory provision does require agencies to review their rules every three years and file annual reports on this periodic review with the LFC and the DFA<sup>5</sup>, but there appears to be no external review of an agencies’ compliance with this provision.

Finally, in 2005, the Legislature created the Small Business Regulatory Advisory Commission (SBRAC) to review rules that might adversely affect small businesses.<sup>6</sup> Agencies were also instructed to consider methods to accomplish statutory objectives while minimizing adverse

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<sup>4</sup> The *Administrative Procedures Act* applies only to agencies that are specifically deemed to be subject to its requirements. Even then, that applicability might be limited to certain areas. For example, the Attorney General’s Office and the Office of Indian Affairs must adhere to the provisions of the APA when jointly promulgating rules for the implementation of the *Indian Arts and Crafts Sales Act*.

<sup>5</sup> Section 12-9-22 NMSA 1978

<sup>6</sup> Section 14-4A-5 NMSA 1978

effects,<sup>7</sup> including periodic reviews of existing rules to reduce economic burdens on small business,<sup>8</sup> but the SBRAC has been largely inactive.

**Committee Referrals:**

HBIC/HAFC

**Related Bills:**

HB 108a *Rules Development Requirements*

HB 482 *Legislative Examination of Education Rules*

SB 157 *Public Education Dept. Rules Procedures*

SB 533 *DFA Cost-Benefit Analysis of Agency Rules* (Identical)

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<sup>7</sup> Section 14-4A-4 NMSA 1978

<sup>8</sup> 14-4A-6 NMSA 1978