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FISCAL IMPACT REPORT

ORIGINAL DATE 02/19/11
LAST UPDATED 03/15/11 **HB** 345/aHHGAC/aHJC

SPONSOR Chavez, D.

SHORT TITLE State Agency Proposed Rule Statutory Citation **SB** _____

ANALYST Hoffmann/Daly

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB30, SB235, Conflicts with HB22

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

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Taxation and Revenue Department (TRD)

Public Regulation Commission (PRC)

Commission of Public Records (CPR)

Department of Transportation (NMDOT)

SUMMARY

Synopsis of House Judiciary Committee Amendment

The House Judiciary Committee amendment to House Bill 345 strikes each occurrence of the word "specific" as it would apply to "statutory provisions" or "statutory authorization" throughout the bill. As a result, the particular commission, cabinet secretaries and departments identified in the bill may adopt rules only upon statutory authorization and must cite the relevant statutory provision when so adopting. In addition, the amendment replaces "department" with the more comprehensive "agency" in the new section of the State Rules Act to make it consistent with that Act.

Synopsis of House Health and Government Affairs Committee Amendment

The House Health and Government Affairs Committee amendment to House Bill 345 strikes each occurrence of the phrase “regarding the content of the rule or administrative directive” as it would apply to “specific statutory authorization.” The amendment also strikes the phrase “regarding the content of the rule” as it would apply to a new subsection of the Rules Act, so the sentence would read “The agency may adopt a rule only upon specific statutory authorization.”

Synopsis of Original Bill

House Bill 345 would amend the Executive Reorganization Act by adding language stating that the affected Departments shall cite the specific statutory provisions warranting rules promulgated, adopted or amended, and that rules may only be adopted upon specific statutory authorization regarding the content of the rule. An “administrative directive” would be subject to the same restrictions as a rule.

The Departments affected are the Public Regulation Commission (Section 8-8-4 NMSA 1978), the Executive Department (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).

With the exception of the PRC, for which the bill would eliminate “regulatory rules”, all references to “regulation” are replaced with “rule.”

Where applicable (the PRC is excluded), the bill would eliminate existing bond requirements for the Secretary, 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”; removes bracketed references; 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; and adds language stating that an agency may make and adopt such reasonable procedural rules as may be necessary to carry out its duties and for any other rule, the agency shall cite the specific statutory provisions warranting rules promulgated, adopted or amended, and that rules may only be adopted upon specific statutory authorization regarding the content of the rule.

The bill would also amend the enabling acts to substitute gender neutral references for the Secretary or Superintendent; to remove references to “regulation”, leaving and sometimes substituting “rule” and “administrative directive” in its place; to eliminate bracketed terms.

FISCAL IMPLICATIONS

House Bill 345 makes no appropriation.

The Commission of Public Records claims House Bill 345 should have no fiscal impact on them 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 Commission 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

For the Commission of Public Records, House Bill 345 raises a number of issues, as follows.

- Title sufficiency. There would appear to be a constitutional problem with the title of the bill and the deletion of the language relating to surety bonds. 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 construed as an attempt to conform requirements for Cabinet secretaries and division directors since some of the statutes relating to responsibilities of secretaries of particularly some of the newer Cabinets lack the surety bond requirements. Since the bill does not touch on all cabinets, it **may** leave intact the surety bond requirements of those not affected – unless the amendment to the Executive Reorganization Act removing the requirement can 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 (rule) is that it must be made pursuant to statutory authority – that it cannot be used to expand statutory authority. It is true that in NM 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 Commission’s NMAC training and something of which legal counsels involved in rule-making should be aware.
- The Commission of Public Records 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 Commission 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 of amending of statutes governing the powers and duties of secretaries of some but 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.
- The treatment of the “administrative directive” may lead to confusion. The amendments to the Executive Reorganization Act and the individual cabinet agency statutes generally add the term “administrative directive,” so that the language reads “rule or administrative directive.” However, the only place the term appears to be given any definition is in the amendment to Section 14-4-2 NMSA 1978 (Section 21 of the bill), where it is included within the definition of “rule.” It does not seem necessary – in fact, it seems to obfuscate the meaning of the term – by incorporating the language “rule or administrative directive” in the various amendments. By including “administrative directive” within the definition of rule, such an item then basically becomes a rule (something, regardless of what it is called, that affects any person or agency other than the issuing agency and for which there is no specific statutory exemption); the repeated use of the term through the bill and, in particular, the use of the “or” implies that it is something other than a rule.

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.

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

PERFORMANCE IMPLICATIONS

House Bill 345 would appear to have few, if any performance implications for the Commission, as long as the term “administrative directive” is read to mean only something that affects others outside the issuing agency.

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, COMPANIONSHIP, RELATIONSHIP

HB22 (Require Regulatory Impact Statements) is in conflict with this bill; both bills propose to amend Section 14-4-2 NMSA 1978.

SB235 appears to be a duplicate, except it does not include “administrative directives.”

HB345 is related to SB30 (and its duplicate, HB360) which would make changes to the rulemaking process.

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

OTHER SUBSTANTIVE ISSUES

The Commission of Public Records would support the inclusion of the term “administrative directive” within the definition of rule, although it 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 – it something affects or purports to affect any person or agency outside the issuing agency, then it is a rule absent a specific statutory exemption. However, there have been agencies that have persisted in issuing “administrative directives” without going through the rule-making process. If this would clarify that an administrative directive that affects others outside the issuing agency qualifies as a rule, it would be helpful. On the other hand, the deletion of “statement of policy” could lead to, once again, agencies attempting to circumvent the rule-making process by calling something a “statement of policy” even if affects those outside the agency.

The only concern the Commission has is with the way the term “administrative directive” is used in the amendments to the Executive Reorganization Act, the PRC statute and the individual Cabinet agency statutes (the “rule or administrative directive” language).

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.

MD/bym:mew