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FISCAL IMPACT REPORT

ORIGINAL DATE 02/11/11

SPONSOR Egolf and Keller LAST UPDATED 02/27/11 HB 360/aHBIC

SHORT TITLE Requirements for Altering State Rules Act SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
	NFI	*	*	*	Recurring	General Fund et al.

(Parenthesis () Indicate Expenditure Decreases)

*It is not possible to quantify the fiscal impact of this bill, so costs are indeterminate, but there will be additional costs and operating expenses. See Fiscal Implications below.

Duplicates SB 30
 Conflicts with HB 22, SB 67 and SB 104
 Relates to SB 67 and 104

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Public Employees Retirement Association (PERA)
 Energy, Minerals & Natural Resources (EMNRD)
 Office of State Engineer (OSE)
 Human Services Department (HSD)
 Department of Health (DOH)
 NM Environment Department (NMED)

SUMMARY

Synopsis of HBIC Amendment

The House Business and Industry Committee amendment expands the distribution of rulemaking information to the public by adding a provision requiring that information to be provided to all libraries that are part of the state library system.

Synopsis of Original Bill

House Bill 360 is the product of a task force formed in 2010. It provides a detailed, uniform process for the state agency rulemaking process. HB 360 amends the State Rules Act to include

a requirement 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 the 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.

HB 360 also 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 360 also amends existing sections of the State Rules Act to add definitions necessary for the rulemaking process and to coordinate the new process with existing rule filing requirements.

A detailed description of the provisions of HB 360 is set forth in the report of the task force which is an attachment to this FIR.

FISCAL IMPLICATIONS

The additional procedures required for an agency to adopt new rules and rule changes may increase its costs. For example, in its analysis of SB 30, which duplicates HB 360, the Medical Board estimates that since additional text would need to be posted or published, its costs for just this activity could double (FY 10 costs were approximately \$1250). Many other agencies anticipate a need for additional staff, but are unable to quantify the costs of the additional workload because they have had no experience complying with the additional procedural requirements.

As it reported in its analysis of SB 30, which duplicates HB 360, the Commission on Public Records (CPR) is directly impacted by HB 360's requirement that an agency file a concise explanatory statement with each new rule, amendment or repeal. The agency would have to develop both the process and means of filing and retaining the documents. This function would be new for the agency and is not without continuing costs, although the exact fiscal impact is difficult to determine. Clearly, it will increase workload and require some continuing operational costs such as supplies and printing.

The AGO notes that the requirement in Section 12 that that agency adopt default procedural rules will impact its workload.

SIGNIFICANT ISSUES

HB 360 is intended to provide a uniform process for the consideration of new rules, changes to or repeal of existing rules, 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, provides a basic process for adopting rule changes but these procedures apply to hardly any agencies. HB 360 will establish a process that applies to all state agencies, including state boards, commissions, departments, institutions and officers, except the judicial and legislative branches.

HB 360 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 360 is a result of the Task Force efforts. The Task Force, which was comprised of legislators, industry representatives, community group representatives and state agencies, presented its results to the Legislative Regulatory Process interim subcommittee.

Many of the rulemaking requirements in SB 30 are currently followed by most state agencies, but HB 360 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 and a variety of other means to provide information to the public (including relevant legislative committees), 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 in the process.

PERFORMANCE IMPLICATIONS

Several agencies express concern that the additional time necessary to complete a rule-making may impact compliance with federally funded programs that require state rule updates to conform with federal statutory or rule changes. Additionally, agencies anticipate increased staff time devoted to rulemaking, which at the very least would result in decreased resources available for other agency work. The AGO notes that it provides legal counsel to state boards and commissions and will likely have to perform or assist in several of the additional duties set in the bill.

ADMINISTRATIVE IMPLICATIONS

Most of the agencies commenting on HB 360 believe this bill will generally make rulemaking more complicated for agencies due to the number of new procedural requirements for agencies. These requirements will likely lengthen the time for agencies to complete a rulemaking and may either discourage agencies from some rulemakings or result in consolidated rulemakings to preserve agency resources. Agencies will likely continue to propose rule changes when needed to comply with changes in federal or state laws. Rulemakings designed to clarify existing rules may become less numerous.

Having additional steps for agencies to follow may also provide additional causes to challenge agency actions in court for failing to follow all the required steps in the process.

HSD cautions that the requirement to distribute rulemaking information to district and field offices would require it to distribute to approximately 50 field offices throughout the state. That

distribution would require staff time and resources and may further increase and complicate already long wait times for persons seeking public assistance such as SNAP (food stamps), Medicaid or child support services in HSD field offices.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 360 duplicates SB 30.

HB 360 conflicts with House Bill 22 in these ways:

- Both bills define “rule” and “rulemaking” but define the terms differently.
- Both bills amend the format, filing and distribution section with different wording.
- Section 14 of HB 360 conflicts with Section 3 of HB 22. Each bill amends NMSA 1978 Section 14-4-5 in a different manner. HB 22 amends and augments that section, while HB 360 deletes the language concerning emergency rules in light of its creation (in Section 9) of a new section which addresses emergency rules specifically.

HB 360 conflicts with SB 67 and SB 104 to the extent that SB 67 and SB 104 allow an agency head to direct that a rulemaking be conducted under the Administrative Procedures Act.

HB 360 relates to SB 67 and 104 to the extent that an agency rulemaking in which a hearing officer is to be used would be conducted by a hearing officer from the administrative hearing office created in those bills.

TECHNICAL ISSUES

While Section 5(D) allows an agency to change the deadline for submitting comments or the date of a rule hearing, it does not specify how many days notice must be given to the public. Additionally that subsection does not specify whether that notice must meet the requirements of the defined phrase “provide to the public”.

In its analysis of SB 30, which duplicates this bill, CPR expresses concern that deletion of “policy” from the definition of “rule” in Section 1 could lead to agencies circumventing the required rule-making process by use of that deleted term, as it has in the past. Adding an exclusion for internal policies may help clarify the term.

OTHER SUBSTANTIVE ISSUES

In its analysis of SB 30, which duplicates HB 360, CPR supports the provisions in Section 9 regarding emergency rules. It advises that the absence in current law of a universally applicable limitation on the use of emergency rules, or a requirement that a full rulemaking process occur after the initial adoption, has led to improper use of “emergency” rules that become permanent upon filing without any public notice, input or hearing.

A number of agencies have noted conflicts between HB 360 and their governing statutes (e.g. NMSA 1978, Section 8-8-15(D) requires PRC to take final action on a proposed rule within 18 months of notice of proposed rulemaking, as opposed to the two year period provided in Section 11(B) of HB 360; NMSA 1978, Section 61-1-30 provides for adoption of emergency rules by licensing boards subject to the Uniform Licensing Act under more limited conditions than those set out in Section 9 of HB 360 and sets a 45 day expiration date for any emergency rule unless

the agency has begun a normal rulemaking process, which process under that existing law must be completed within 120 days, in contrast to the 180 day expiration date in HB 360). Under NMSA 1978, Section 12-2A-10(C), HB 360 appears to be a comprehensive revision of law on the subject of rule-making and so HB 360 would govern, but adding language clarifying the controlling nature of HB 360 might be helpful in avoiding future confusion.

In its analysis of SB 30, which duplicates HB 360, DGF urges expansion of the criteria for emergency rules to include environmental emergencies and imminent threats to environmental health, safety or welfare Due to increased threats to native wildlife resources due to human movement of diseases and pathogens across biogeographic regions. Additionally, DGF advises that the 180 day limit on emergency rules could potentially conflict with future migratory bird rules which must put in place following after the federal fish and wildlife agency approval of each annual season, which because that approval typically occurs just prior to the start of each season, DGF must adopt its rules under emergency rule procedures. The 180 day life of an emergency rule under HB 360 could cut short migratory bird seasons, resulting in the loss of license-holders' hunting opportunities and the related license revenue to the state.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to follow existing procedures for the promulgation of rules as provided by statutes, rules or agency policy.

POSSIBLE QUESTIONS

Under Section 13, will the concise explanatory statement need to be maintained by CPR as part of the rule?

MD/bym:svb