

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 03/07/11

SPONSOR Doyle LAST UPDATED _____ HB 409

SHORT TITLE State Agency Rule Economic Impact Statements SB _____

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$500.0	\$500.0		Recurring	General Fund, et al

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 22, HB 69, HB 360, HJR 3, SB 30, SB 235 and SJR 3

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Commission of Public Records (CPR)
 Department of Health (DOH)
 Department of Transportation (DOT)
 Educational Retirement Board (ERB)
 Energy, Minerals & Natural Resources (EMNRD)
 Environment Department (ED)
 Investment Office (IO)
 Office of the State Engineer (OSE)
 Public Education Department (PED)
 Regulation & Licensing Department (RLD)
 Taxation & Revenue Department (TRD)

SUMMARY

Synopsis of Bill

House Bill 409 amends the State Rules Act to require state agencies to prepare an economic impact statement when making rules.

HB 409 will require state agencies to provide the following information in an economic impact statement:

- a summary of the rule;
- a description of any person, resources, classes of persons, and political subdivisions that will be affected;

- the probable negative and positive economic impacts of the rule;
- a comparison of the costs and benefits of implementing the rule to the costs and benefits of inaction;
- the probable negative or positive impact to the state general fund, the state budget, and any state special fund of implementing the rule;
- a statement on whether there are means for achieving the purpose of the rule with fewer adverse effects; and
- a summary of public comments or other evidence related to the rule submitted during the rulemaking process.

State agencies will prepare a draft economic impact statement at the beginning of the rulemaking process and make it available for public inspection during office hours. Notice of a public hearing on a rule will have to include a public announcement that a draft economic impact statement is available for inspection and comment. At the end of the rulemaking process and upon the filing of a rule, state agencies will have to prepare a final economic impact statement. State agencies will be required to prepare the economic impact statement in the format and style established by the State Records Administrator.

If a state agency is unable to complete all or part of an economic impact statement due to hardship, including lack of agency resources or unavailable information, the agency will be required to indicate the reason for the hardship in lieu of completing all or part of the document. Unless otherwise provided in the State Rules Act, no rule will be valid or enforceable until the rule and the final economic impact statement are filed with the State Records Center.

The State Records Administrator will be required to maintain and make available to the public a list of all economic impact statements filed with the State Records Center and any notices of exemption. The State Records Administrator will be required to maintain and file the original copy of any economic impact statement as a permanent, public record.

The State Records Administrator will be required to provide a list of all economic impact statements filed with the State Records Center on July 1 of each year to the Governor, the Senate President Pro-Tem, and the House Speaker for distribution to the appropriate standing or interim legislative committee.

Notwithstanding other provisions of the State Rules Act, the Public Regulation Commission will be exempt from preparing and filing economic impact statements.

HB 409 also adds a new section that provides that if the Department of Finance and Administration (DFA) receives a complaint specifying that the final economic impact statement underestimates the negative impact of the rule that DFA shall assess the final economic impact statement and determine if the agency underestimated the negative impact. If DFA determines that the agency underestimated the negative impact of the rule, DFA shall determine the dollar amount by which the agency underestimated the negative impact of the rule and subtract the dollar amount by which the agency underestimated the negative impact from the agency's budget in the subsequent fiscal year.

FISCAL IMPLICATIONS

Although the exact fiscal implications are unknown, there will be additional administrative costs to state agencies related to the preparation, maintenance, and distribution of economic impact

statements. No appropriations to state agencies have been made to cover these costs and existing resources are already limited. The estimates set forth in the Additional Operating Budget Impact section is based on an economic study which the Legislature specially commissioned for the New Mexico Natural Gas industry several years ago, at a cost of \$100,000. It assumes that all state agencies combined will, on the average, adopt a total of five rules per year that will require extensive economic analysis of an entire industry. On this basis, it is estimated that additional appropriations of at least \$500,000 per year will be needed to enable agencies to comply with this bill. This is likely a conservative estimate of the number of rules needing extensive economic analysis given the potential for an agency's budget to be reduced if it underestimates negative economic impacts.

Each of the larger agencies indicates a need for at least one full time FTE to comply with the provisions of this bill. The smaller agencies will need hardship exemptions.

SIGNIFICANT ISSUES

It will be difficult, if not impossible, for the TRD to develop an economic impact statement for some regulations, such as those dealing with how to obtain licenses or how TRD suspends or revokes those licenses. For example, suspending an auto dealer's license for fraudulent activity may have a negative economic impact on the dealership and the employees, but it may have a positive economic impact on auto buyers who will not be defrauded. Because an agency's budget can be impacted, the result may be agencies drastically overstating the economic impact so the true impact will be difficult to estimate.

The DOH notes that the staff drafting rules usually do not have the expertise to develop an economic impact statement, but rather have expertise in the programs needs and services provided, administered or regulated by DOH. While staff will make a best estimate of economic impact, it may be possible to inadvertently underestimate the impact.

The OSE notes that because the bill provides for negative consequences to the agency only for underestimating negative impacts, the incentive is for agencies to overstate both negative and positive impacts of proposed rules. This will distort the accuracy of EISs.

The AGO provided the following:

It is not clear why this bill is necessary or how it improves the rulemaking process. The bill creates an additional bureaucratic burden on agencies that promulgate rules and requires them to divert personnel resources to drafting EIS. This will be particularly burdensome for small agencies that promulgate rules only occasionally.

While an agency's budget can be adversely impacted due to a miscalculated EIS, the bill does not provide agencies with any guidance on how to calculate or fairly assess a rule's probable impact on affected people and entities, resources, or state funds or how to perform a cost-benefit analysis. As a result, an agency's budget could be adversely impacted merely because DFA utilized a different assessment mechanism.

The bill also does not place any time limitations on filing a complaint about an EIS with DFA. Thus, agencies could be subject to an EIS assessment and a budget cut long after it has engaged in rulemaking.

DOT states that this bill will require an agency that is proposing, amending or repealing a rule to determine all positive and negative economic impacts upon a broad class of persons and entities. Although the bill requires that a draft EIS be announced in a notice of hearing on the rule, it does not require that potentially impacted persons, classes of persons, resources or political subdivisions actually provide accurate information and comment upon the rule that is proposed, amended or repealed. Thus, an agency's ability to predict the positive or negative impact of a rule is largely dependent upon the information, and accuracy of that information, that third persons or entities choose to provide during the rulemaking process. The bill does not forgive an agency for failing to predict a negative economic impact even if no such information is provided to the agency by those persons and entities. If the agency fails to accurately assess a negative economic impact to any degree, the agency is subject to punitive measures through a loss of budget in the subsequent fiscal year.

There is nothing in this bill that defines what constitutes an "underestimation." It is possible that many taxpayer dollars and DFA resources will be spent trying to identify an "underestimation" that results in a very minimal penalty to an agency in terms of a loss in future budget. The small gain may not warrant the cost to obtain it. The bill does not address whether an agency will receive a dollar-for-dollar increase in its budget if it underestimates a positive economic impact of a rule.

Similarly, this bill does not define what constitutes a "negative impact." What may be considered a negative economic impact by some might be considered a positive impact by others. When making a determination as to whether there is a "negative impact," and to what extent that impact was "underestimated," will there be an offset to the agency between the positive and negative impacts of the rule as it is applied to the entire spectrum of persons and entities impacted?

ERB states that this bill requires economic impact statements for all rule changes and does not differentiate between rules that are being substantively changed from those that are being amended for technical improvements, language clean-up, or similar small corrections. These requirements could have the effect of discouraging agencies from making minor changes to its rules, even if they were beneficial.

This bill may delay the adoption or amendment of rules and will result in increased operating costs to agencies. Many agencies currently review the economic impact of proposed rule changes or amendments and if needed, instruct its accountants or actuaries to prepare statements as to the positive or negative effect of a proposed rule change.

ADMINISTRATIVE IMPLICATIONS

This bill will create significant additional personnel time and expertise required to provide fiscal impact statements for all rule changes.

RLD notes that without additional staff to prepare economic impact statements, rulemaking will grind to a halt. The regulations that are in place now will remain in place. Even repealing a rule requires a rulemaking process with the added expense of a preparing an economic impact statement. Under HB 409, the new Governor's directive to review all rules and repeal any that are unnecessary will require an economic impact statement be prepared.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 409 conflicts with HB 22. Both bills require an impact statement to be filed with rules; however, the name of the document, content and process are slightly different.

Many sections of HB 409 relate to SB 30 and HB 360; however, a few sections conflict.

- Section 1 of HB 409 conflicts with Section 1 of SB 30 and Section 1 of HB 360. Each bill amends the definition of “rule” in a different manner. Both bills add a definition for “rulemaking” but define the term differently.
- Section 2 of HB 409 conflicts with Section 14 of SB 30 and Section 14 of HB 360. Each bill amends Section 14-4-5 NMSA 1978 in a different manner. The language is being amended and augmented in HB 409 but is being deleted in SB 30 and HB 360.

HB 409 relates to HB 69, HJR 3, SB 235 and SJR 3 in that they all deal with state rules and rulemaking.

TECHNICAL ISSUES

EMNRD provided the following technical issues with suggested amendments:

In Section 3(A), (Page 3, Line 20), the term “At the beginning of the rulemaking procedures” is vague. Some agencies go through a lengthy rule negotiation process before formally offering a rule for public comment. Adding on page 3, line 20, insert after procedures “and no later than the publication of notice of a proposed rulemaking in the New Mexico register”

Also, in Section 3(A) rule, the requirement for a draft economic impact statement at the beginning of the public process (Page 3, Line 21-23) makes compliance with the requirement for a summary of public comments (Page 2, Line 21-22) difficult. On page 3, line 23, insert after hours “the draft regulatory impact statement shall include the information listed in subsections (B)(1) through (B)(6) below.”

Again, in Section 3(A), the bill refers to notices of public hearing (Page 3, Line 23-24) but not all agencies may hold a public hearing on a proposed rule. Some may be allowed, as are federal agencies, to simply request comments on a proposed rule. See Amendment #3 below. On page 3, lines 23 and 24, delete “that notice of a public hearing on a rule is made” and insert “when notice of a proposed rulemaking is published in the New Mexico register and elsewhere”.

Section 3(C) does not indicate what the agency should do with the reasons for hardship. On page 5, line 5, insert after “statement”: “and include the reasons with any rule filed with the records center”.

The use of the term “agency” can be confusing, particularly in regard to who prepares the economic impact statement. In some cases, one agency may propose a rule to another agency that decides whether to adopt the rule. EMNRD may propose rules to the Mining Commission, Coal Surface Mining Commission, and Oil Conservation Commission (OCC). Similarly, the Environment Department proposes rules to the Environmental

Improvement Board and the Water Quality Control Commission. Also, in some cases, the proponent of a rule change may be a non-governmental entity. Logically, the best solution may be to have the agency with rulemaking authority (e.g., the OCC) be responsible for having the economic impact statement be prepared by someone. On page 3, line 21 delete “prepare” and insert “make” and on line 22, delete “and make the document” and on page 4, line 3, delete “prepare a final regulatory impact statement

On page 3, line 25, delete “public announcement” and insert “statement”.

OTHER SUBSTANTIVE ISSUES

CPR provided the following:

In many cases, it can be very difficult to quantify precisely the positive or negative impact of a rule action. A mistake in an estimate, however honest, could be devastating, particularly to a small agency’s budget. If there were evidence documenting a deliberate and substantial underestimation, action against the responsible employees could be reasonable. However, the bill sets no dollar threshold and offers no allowance for human error. Further, to penalize an agency, perhaps jeopardize its ability to meet its statutory responsibilities, because of an error made by an individual or several individuals seems excessive.

Since the actions of the DFA will affect other state agencies and therefore will qualify as rules, the DFA will presumably have to promulgate rules governing the process of accepting and evaluating complaints, determining dollar amounts and initiating budget reductions. It will also have to file economic impact statements. What is the process if it underestimates negative impact? Further, what about DFA’s own rules? Who handles complaints about them and assesses the validity of those complaints.

The provision that the DFA will investigate a complaint, decide its validity and determine the amount of the underestimation is disturbing. There is nothing that qualifies the DFA to evaluate the impact of most rules other than their own.

ALTERNATIVES

The Uniform Law Commission (ULC) recently adopted a revised Model State Administrative Procedure Act. CPR suggests it may be beneficial to compare aspects of this bill with the Model Act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to almost every agency responding, if this bill is not enacted, there will be no additional bureaucracy or administrative costs to the state. Adequate due process safeguards already exist. State agencies are already required to notify the public of any rulemaking and to allow for public comment.

POSSIBLE QUESTIONS

Why is the Public Regulation Commission exempt?