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FISCAL IMPACT REPORT

ORIGINAL DATE 02/02/11

SPONSOR Nuñez LAST UPDATED 03/04/11 HJR 3

SHORT TITLE Legislative Nullification of Rules, CA SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	\$104.0	NFI	\$104.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SJR 3
Relates to HB 22, HB 69, SB 3

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Attorney General's Office (AOC)
Public Regulation Commission (PRC)
Energy, Minerals & Natural Resources Department (EMNRD)
State Land Office (SLO)
Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Joint Resolution 3, introduced on behalf of the Economic and Rural Development Committee, is a proposed constitutional amendment which, if approved by the voters, will allow the legislature to nullify an administrative regulation or rule adopted by an executive agency by a resolution passed by a majority of the members elected to the New Mexico senate and to the New Mexico House of Representatives.

FISCAL IMPLICATIONS

The Secretary of State reports that in accordance with Section 1-16-4 NMSA 1978, upon receipt of the certified proposed constitutional amendment or other question from the Secretary of State, the county clerk shall include it in the proclamation to be issued and shall publish the full text of each proposed Constitutional amendment or other question in accordance with the constitution of New Mexico.

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Although the county clerk includes the proposed amendments in the clerk's proclamation, it is the responsibility of the State to pay for the costs associated with the publication per Section 1-16-13 NMSA 1978. The approximate cost per constitutional amendment is \$104,000, which is reflected in the table above.

No fiscal impact is anticipated as to the rule-making agencies that might be impacted by legislative nullification of a rule if this constitutional amendment is approved by the voters. Since the legislature has existing authority to adopt new laws or amend existing law to overturn rules it disagrees with, any costs incurred by the agency needing to enact a new rule, or amend an existing rule in light of a legislative nullification would be the same as that under existing law if the legislature amended the substantive law in a manner that required additional rule-making. It would appear that those costs could be covered by the rulemaker's existing budget.

SIGNIFICANT ISSUES

The AGO reports that attempts in other states to enact statutes providing for a "legislative veto" of rules and regulations adopted by administrative agencies have been subject to challenge under those states' constitutions. A challenge usually alleges that a statute authorizing the state's legislature to repeal or nullify an administrative rule amounts to a legislative intrusion into the executive rulemaking function in violation of separation of powers principles or to an impermissible attempt by the legislature to make laws contrary to the procedures governing the enactment of statutes in the state's constitution. By authorizing the legislature to nullify agency rules and regulations in the New Mexico constitution rather than in a law, HJR 3 undercuts the potential for a successful challenge on state constitutional grounds.

The AGO also notes that HJR 3 refers to rules and regulations of "executive agencies." While agencies in the judicial and legislative branches likely would not be considered executive agencies for purposes of the proposed amendment, it is not clear whether agencies in the executive branch headed by independently elected officers, such as the Attorney General's Office, Secretary of State's Office, State Land Office, State Auditor's Office and the Public Regulation Commission, would or should be covered.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HJR 3 relates to HB 22, HB 69, and SB 91, which all deal with rules or rule-making. HJR 3, which would require a majority vote in each house to nullify an executive agency rule, conflicts with SJR 3, which would require a 2/3 vote in each house to do so.

TECHNICAL ISSUES

SLO and EMNRD note the term "nullify" may be interpreted to mean the rule never existed, which would give rise to questions regarding past actions taken or omitted pursuant to the rule, and the status of obligations incurred or benefits enjoyed by those impacted by the rule prior to its nullification.

Additionally, EMNRD points out the term "rule" without more is unclear: must the entire rule be nullified, or can the legislature nullify only one section, part, or amendment?

OTHER SUBSTANTIVE ISSUES

The meaning and purpose of the first sentence of HJR 3, which states that rules have the force and effect of law but are not equal in status to statutory law, is unclear.

HJR 3 allows the legislature to overturn rules after they have been adopted. In some cases, a rule may have gone into effect before the legislature meets and nullifies the rule. This may confuse members of the public who are subject to the rule and may result in wasted time, effort and resources for agencies who go through the entire rulemaking and promulgation process before the rule goes before the legislature and is possibly overturned.

The AGO also notes that, although HJR 3 avoids the common state constitutional issues raised by legislative veto statutes, its practical effect on agencies may lead to other legal challenges. By overturning a rule, the legislature, in effect, will be overriding the statutory authority it originally conferred on the agency. This potential for a legislative veto may create uncertainty within the agency and among members of the public about an agency's authority and limit the agency's effectiveness. HJR 3 also may make the rulemaking process more cumbersome and inhibit agencies from promulgating rules even when they are consistent with the agency's statutory authority.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The legislature will retain its present authority to enact legislation overturning rules the legislature disagrees with or amending agency authorizing statutes to better reflect the legislature's intent regarding the agency's authority.

AMENDMENTS

1. To avoid confusion about applicability of a rule, require legislative review and approval of proposed rules, rather than waiting until rules have been adopted and perhaps implemented, but make allowance for emergency rules that must go into effect immediately to avoid threats to public health or safety and other emergency situations or to comply with federal requirements.
2. Instead of making HJR 3 self-executing, provide for future adoption of implementing legislation to better define the process, perhaps including time limits for legislative action, and the effect of legislative review and nullification.
3. See Technical Issues.

MD/bym:svb