

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** 01/27/12  
**LAST UPDATED** 01/30/12    **HB** \_\_\_\_\_

**SPONSOR**    Boitano

**SHORT TITLE**    Small Business Regulatory Commission    **SB** 109

**ANALYST** Lucero

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY12	FY13	FY14		
	(potentially substantial)	(potentially substantial)	Recurring	Federal Revenues, Various Special Revenue Funds and Corrective Action Funds

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal	Minimal to Moderate	Minimal to Moderate	Recurring	General Fund
		Unknown	Unknown	Unknown	Recurring	Various Special Revenue Funds and Corrective Action Funds
		\$160.0	\$160.0	\$320.0	Recurring	Taxation and Revenue Department

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Economic Development Department (EDD)
- Commission of Public Records (CPR)
- Environment Department (ED)
- Taxation and Revenue Department (TRD)
- Regulation and Licensing Department (RLD)

## SUMMARY

### Synopsis of Bill

Senate Bill 109 amends Section 14-4A-4 NMSA 1978, the Small Business Regulatory Relief Act, to expand the Small Business Regulatory Relief Commission's (SBRAC) authority to review proposed and existing rules to include reviewing new forms and modification of forms as well as adding time limits for both the SBRAC to respond to proposed changes.

The bill would expand the SBRAC's scope by authorizing it to review existing rules or forms to determine whether they place an unnecessary burden on small business and make recommendations to the agency to mitigate the adverse effects. Agencies must respond to such recommendations within sixty days or the rule or form is nullified 180 days from the date of notice by the SBRAC to the agency.

## FISCAL IMPLICATIONS

The SBRAC is administratively attached and staffed by the Economic Development Department (EDD). The EDD notes that the increased workload may require an additional FTE. The increased workload for the SBRAC will also result in higher per diem and mileage reimbursements.

According to the New Mexico Environment Department, the fiscal consequences of this bill could be substantial if for any reason the department overlooks a SBRAC recommendation. The bill specifies that failure to timely respond to a SBRAC recommendation would result in nullification of an existing form or rule. Nullification of an existing rule, if it occurred, could have serious fiscal consequences for the department. Depending on the rule at issue, loss of regulatory authority could lead to loss of millions of dollars of federal funding or fee revenues and layoffs of employees. The existing rule which would be nullified represents a substantial investment of public funds that may be lost. While these consequences could be avoided by responding to all SBRAC recommendations, there is no safety valve if a SBRAC recommendation is overlooked or mislaid.

If a rule were nullified, it would take at least six months or so (perhaps longer) to adopt a new rule because of notice and publication requirements; if there were an appeal, there might be no rule on a particular subject for years. Promulgation of a new rule would also incur substantial expense in the form of employee time (attorney, hearing officer, witnesses), per diem (if applicable), court reporter, and publication costs. In the meantime, depending on the rule, state rules providing food safety, safe drinking water, septic tank requirements or other areas essential to protecting public health would cease to apply and the state might lose significant revenue.

The Taxation and Revenue Department (TRD) reports the bill adds a new layer to the review and approval of forms. This will have the impact of requiring two additional FTE to the TRD for the forms and instructions process at a cost of \$80,000 per FTE. Because of the additional review requirements, forms will have to be revised early allowing ample time to implement them. New legislation often provides only limited time to implement changes that affect small businesses. The implication of these requirements will have to be considered when drafting an appropriate effective and applicable date for legislation pertaining to the TRD.

## SIGNIFICANT ISSUES

The TRD notes that regulatory due process requires public notice and a hearing before a repeal of a rule that was already properly adopted through public notice and a public hearing. This bill's provisions to "nullify" a rule through an agency's failure to respond to the SBRAC's review overlook the required public notice and hearing required to repeal a previously adopted rule.

This bill affects all the boards in the Regulation and Licensing Department (RLD) significantly. Proposed rules have set review process defined in the Open Meeting Act Sections 10-15-1 through 4 NMSA , including publication of rules and notice to all interested parties and of public rules hearing and board meeting. The SBRAC would need to be added to the interested party list to receive notice of all rule hearing and can submit recommendations or comments written or in person at the hearing. The requirements in the Open Meeting Act already require a 30 day notice to all interested parties and notification in the NM register.

The State Commission of Public Records reports that the bill adds new language to require agencies to not only submit proposed rules that may affect a small business to the SBRAC, but also to submit any forms the agency is considering changing. For purposes of this Act, change includes conversion to electronic format.

Additionally, the language requiring an agency to consider rules that minimize adverse effects on small business is repealed and replaced with the following specific timelines and actions the agency and SBRAC must adhere to:

1. The SBRAC has 30 days from receipt of the proposed rule or form to determine if they shall review the rule or form. The decision can be made without a meeting and only requires agreement of 3 members.
2. If the SBRAC doesn't notify the agency that they shall review the proposed rule or form within the 30 days or responds to the agency that they have no objections, the rule making or form revision can proceed.
3. If the SBRAC decides to review the proposed rule or form the SBRAC must meet within 45 days of their response to an agency and make recommendations concerning the proposed rule or form. The cabinet secretary or an authorized person must attend the meeting. If the SBRAC fails to hold the meeting within the 45 days, the agency may proceed with the proposed rules or form adoption.
4. The agency is not required to comply with the SBRAC's recommendation but must report their decision to the SBRAC.
5. If the SBRAC notifies the agency and holds a meeting within 45 days, the proposed rule or form shall not take effect until after the meeting.

The bill also changes "chairperson" to "chair" and replaces "may" with "shall." Replacing may with shall requires the SBRAC to (1) provide agencies with input regarding proposed rules or forms (2) requires SBRAC to consider requests from small businesses to review rules or forms adopted by an agency and (3) requires the SBRAC to provide the governor and legislature an annual report.

A new paragraph in Section 14-4A-5 of the Act authorizes the SBRAC to review existing agency rules and forms pursuant. If the SBRAC reviews rules or forms and makes a recommendation to

the agency to change the rule or form, the agency is required to respond within 60 days or the rule or form is “nullified and cease to be in effect” or in use 180 days after the SBRAC notified the agency that they must review and respond to the SBRAC.

Section 3 is completely repealed, which required agencies to complete periodic review of rules adopted prior to the creation of the SBRAC and review those rules adopted after the creation of SBRAC every 5 years.

These amendments could negatively impact the process of rule making and make it more challenging for an agency to improve their forms in a timely manner. Certainly, public complaints related to forms would not be responded to quickly.

### **PERFORMANCE IMPLICATIONS**

Some agencies may be impacted by the new period of time required to notify the SBRAC of proposed changes and wait for SBRAC to review the changes.

### **ADMINISTRATIVE IMPLICATIONS**

Being administratively attached to the EDD, there may be a minimal additional administrative cost associated with the additional workload to review proposed changes within the designated new timeframes.

The NMED regulates numerous areas which “may affect” small business, including but not limited to such areas as, food permits; occupational health and safety; drinking water; liquid waste; hazardous waste; petroleum storage tanks; construction of drinking water and wastewater systems; solid waste and recycling; radioactive materials; medical imaging and radiation therapy; certifications, registrations and licenses for water and wastewater operators, and medical imaging personnel; and providers of financial assurance for various programs.

If the SBRAC decides to review very many of the NMED’s existing rules and forms, additional FTE’s will be required to respond to that review. The NMED regulates many areas and there are therefore many rules and forms to potentially review. If no new funding is provided, the need to review large numbers of existing rules and forms could lead to significant decreases in the NMED’s ability to serve the public.

### **CONFLICT, RELATIONSHIP**

The bill may conflict with HB34 which is proposing amendments to the State Rules Act.

The bill relates to Senate Bill 22 which requires the Regulation and Licensing Division (RLD) to develop estimates of the cost of regulatory compliance for various industries. This is a similar subject to addressing issues of regulatory fairness for small businesses.

### **TECHNICAL ISSUES**

The State Commission on Public Records notes:

Section 2, paragraph D requires an agency to respond to SBRAC within 60 days and if the agency fails to respond the rule or form is nullified and ceases to be effective 180 days later.

It's unclear what happens in between this period. SBRAC is not given authority to reverse the nullification or effectiveness of the rule or form in the event the agency responded on day 65. If the intent was to allow the agency to respond during the entire 180 day period and avoid nullification, the statute should be clarified. If the intent is to make nullification unavoidable after sixty days but give the agency time to plan for the administrative and fiscal consequences of nullification, the statute should be clarified to explain that purpose.

Furthermore, it is not clear how these amendments fit with the current rule making process mandated under the State Rules Act, Section 14-4-1 NMSA 1978, and other rule making statutes included in agency authorization statutes.

## **OTHER SUBSTANTIVE ISSUES**

The State Commission on Public Records notes:

Further formalizing the process for an agency to change a form could add significant additional time to updating forms. In most cases, forms are changed to eliminate information no longer needed or to request new information that is needed to proceed with the license or services requested. Forms fall within the definition of rules and should be included in an agencies rule. Agencies are encouraged to describe the form including all the information to be divulged on the form. Since the SBRAC is authorized to review rules, even if the agency only specifies the information required on a form, they are technically charged with reviewing forms. However, changing a form to make it more user-friendly, or available electronically, should remain with the agency to ensure efficiency. It is the responsibility of the agency head to ensure that forms are necessary, efficient and relevant. Requiring the SBRAC to review forms, even those simply changed to electronic media, and requiring agencies to wait 30 days to receive notice that the SBRAC wishes to review the form could delay positive changes.

Another significant issue is authorizing the SBRAC to make decisions, specifically the decision to review rules or forms, outside the Open Meetings Act and with only 3 members. While it would be burdensome for the SBRAC to meet for the purpose of making a decision to review, it would be more transparent for the public and the agency to know the SBRAC's reasoning for the decision. There are many agencies, boards and commissions that face the same challenges in meeting deadlines and are not exempt from the OMA. Furthermore, the Act as proposed to be amended will require monthly if not weekly meetings to meet the review and recommendation requirements. Last year alone there were 152 notices of proposed rulemaking and 453 rule filings published in the Register.

While the amendment authorizes an agency to proceed with the adoption of a rule or form if the SBRAC doesn't respond within 30 days, if the SBRAC does respond the agency may not proceed with adoption of the rule or form until the SBRAC meets, which must be within 45 days, and makes a recommendation. This process could take as long as 75 days (2 ½ months) in addition to the agencies responsibility to notice proposed rulemaking in the register and publish adopted rules prior to them being enforceable.

Section 2 has a number of significant issues. First, changing "may" to "shall" on line 10 page 4 requires the SBRAC to provide an agency with input, which conflicts with section 1 which authorizes the SBRAC to decide if they will review a form or rule.

Second, it is unclear what it means for a rule or form to be “nullified” or “cease to be in effect.” Currently, rules may be new, amended, repealed, or repealed and replaced. Is a nullified rule removed from the NMAC or just unenforceable? Does the act of nullifying a rule require publishing in the Register to notify the public? Would the agency or SBRAC be responsible for notifying the State Records Center and Archives, which is charged with the responsibility of compiling rules into the NM Administrative Code? Would SBRAC or the agency be responsible for filing the notice and the cost of publishing?

Finally, while the amendment states that nullification of the rule shall not affect any pending administrative action it is not specified when the administrative action begins. For example, would a complaint be the beginning of the administrative process or would the investigation. Or would the process only begin once the person or business has been notified? This uncertainty, could lead to excessive litigation that avoids the substantive issue of the administrative action.

The Economic Development Department reports:

A targeted review of state rules and their impact on small business would have a positive impact on businesses by reducing the regulatory and compliance burdens, and associated expense, on them.

## **AMMENDMENTS**

The NMED recommends the bill be amended to provide that failure to respond to a SBRAC recommendation about an existing rule or form within sixty days results in suspension of the rule rather than nullification. This would avoid most of the serious fiscal impacts of nullification but is still a serious consequence. A rule suspended due to failure to respond to a SBRAC recommendation would go back into effect upon the agency responding to the SBRAC’s recommendation.

NMED further recommends that incorporation of federal rules as required by federal law be exempt from the provisions of the Small Business Regulatory Review Act because the additional public resources expended to comply with the Act’s requirements cannot result in any change to the regulation.

The TRD suggests:

1. Require the SBRAC to submit its review of a proposed rule as part of the public comment process of the existing rulemaking process, thereby having Commission input conform to the timeline required by existing statute concerning rulemaking; and
2. Restrict the authority of the SBRAC to review only proposed and not current rules, in which case, it might not be advisable to repeal Section 14-4A-6 NMSA 1978; and
3. Restrict the authority of the SBRAC to review rules, but not forms.

DL/svb