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SFA**BILL ANALYSIS**

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Senate Bill 255 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Michael D. Bishop
Committee: Government Operations

Date Completed: 4-22-03

RATIONALE

To implement and administer State statutes and governmental functions, State departments and agencies may seek to establish administrative rules. An administrative rule is a department's or agency's written regulation, statement, standard, policy, ruling, or instruction that has the effect of law. Many State statutes require or allow a department or agency to promulgate rules. The Administrative Procedures Act (APA) prescribes the procedures required for the establishment of rules, which can include participation by the Legislature.

The rule approval process was changed several years ago. Among other things, the Legislature's role was modified and the time the Legislature has to consider a proposed rule was reduced (as described in **BACKGROUND**, below). Currently, after the Joint Committee on Administrative Rules (JCAR) receives a letter of transmittal proposing a rule, the Committee has 21 calendar days to consider the rule and to object to it by filing a notice of objection based on the grounds listed in the Act. If JCAR files a notice of objection, the Committee chair, the alternate chair, or any member of JCAR must cause bills to be introduced simultaneously in both houses of the Legislature. The bills must contain one or more of the following: 1) a rescission of a rule upon its effective date; 2) a repeal of the statutory provision under which the rule was authorized; or 3) a stay of the proposed rule's effective date for up to one year. If both houses of the Legislature do not adopt the legislation within the 21-day time limit, the Office of Regulatory Reform (an agency within the Executive Office) may file the rule with the Secretary of State, and it generally will take effect after seven days.

Some people consider 21 days inadequate time for the Legislature to introduce, consider, and enact a bill in response to a rule it finds objectionable. It has been suggested that the APA be revised to give the Legislature more time to respond to proposed rules for which JCAR has filed a notice of objection.

CONTENT

The bill would amend the Administrative Procedures Act to do the following:

- Extend the period of time, from 21 days to 90 days, that a notice of objection stays the ability of the Office of Regulatory Reform (ORR) to file a rule, and during which the Legislature may enact legislation in response to the rule.**
- Allow an agency to withdraw a proposed rule at any time.**

Currently, notice of objection stays the ORR's ability to file a rule with the Secretary of State for 21 calendar days, unless both houses of the Legislature are not in session for more than 14 calendar days after the notice of objection is filed. In that case, the 21-day period is tolled and, upon the return of both houses of the Legislature, the remainder of the 21-day period is available for consideration. (If the Legislature is out of session for 21 days or less, the combined period for consideration by JCAR and the full Legislature may not exceed 63 days.)

Under the bill, a notice of objection would stay the ORR's ability to file a rule for 90 calendar days. If both houses of the Legislature were not in session for more than 14 calendar days during that 90-day period, the 90-day period would be tolled and the remainder would be

available when both houses of the Legislature returned. Currently, if the Legislature enacts legislation within the 21-day period, the rule does not become effective unless the Governor vetoes the legislation. The bill would refer to the 90-day period.

Under the Act, an agency may withdraw and resubmit a proposed rule with or without permission of the JCAR chair and alternate chair, and the following time periods apply:

- If permission to withdraw is granted, the 21-day time period for JCAR consideration and objection is tolled until the rule is resubmitted, except that JCAR has at least seven calendar days after resubmission to consider the resubmitted rule.
- If permission to withdraw is not granted, a new and untolled 21-day time period begins upon resubmission of the rule for JCAR consideration.

The bill would delete these provisions and allow an agency to withdraw a proposed rule at any time. If the rule were resubmitted, JCAR would have a new 21-day period to consider the rule and to file a notice of objection. (The bill would retain the original 21-day period for JCAR to consider a rule and file an objection.)

MCL 24.245a

BACKGROUND

Public Act 262 of 1999 created the current rule-making procedures within the Administrative Procedures Act, following a 1997 ruling of the Michigan Court of Appeals that the former process was unconstitutional (*Blank v Michigan Department of Corrections*, 222 Mich App 385). Previously, if the Joint Committee on Administrative Rules disapproved a rule or reached an impasse on a proposed rule, the agency proposing it could not adopt or promulgate the rule unless JCAR subsequently approved it or the Legislature adopted a concurrent resolution approving the rule within 60 days after each house received a report from JCAR about the disapproval or impasse. The Court of Appeals found that this procedure violated the "enactment and presentment" clauses of Article IV of the State Constitution, and therefore violated the doctrine of separation of powers.

For a time after that decision, rules could be promulgated without approval of either JCAR or the Legislature, although agencies still had to give public notice and an opportunity to be heard. Public Act 262 of 1999 then enacted revised approval procedures, including shorter deadlines.

Under the APA, the Joint Committee on Administrative Rules may file a notice of objection only if it determines one or more of the following:

- The agency lacks statutory authority for the rule.
- The agency is exceeding the statutory scope of its rule-making authority.
- There is an emergency relating to the public health, safety, and welfare that would warrant disapproval of the rule.
- The rule conflicts with State law.
- A substantial change in circumstances has occurred since the enactment of the law upon which the proposed rule is based.
- The rule is arbitrary or capricious.
- The rule is unduly burdensome to the public or to a licensee.

If JCAR does not file a notice of objection within the prescribed time period, the Office of Regulatory Reform may immediately file the rule with the Secretary of State.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

If JCAR files an objection to a proposed rule, the APA gives the Legislature only 21 days to pass legislation to rescind or delay the rule. It can be extremely difficult for legislation to be written, introduced, passed in both houses, and sent to the Governor for approval, within 21 days. Since approved rules have the effect of law, it is essential that the Legislature have sufficient opportunity to have input into rules before they are finalized. The current deadlines are so severe that the Legislature's role is nearly nonexistent, given that a department or agency may have taken months or years to write and propose rules. By lengthening the time to 90 days, the bill would give the Legislature the time it needs to consider proposed rules properly.

Opposing Argument

While the deadline may need to be extended, the bill could cause proposed rules to be delayed, since the Legislature would have 90 days to respond if JCAR objected to a proposed rule. Rules are, in some cases, essential for a department or agency to comply with a statute or administer a departmental function. Giving JCAR and the Legislature a total of 111 days to take action on a proposed rule could bog down the process and/or prevent necessary rules from being implemented in a timely manner.

Response: Currently, except when the Legislature is not in session, JCAR has 21 days to object to a proposed rule, and the Legislature has 21 days, if it wishes, to respond to the objection. This 42-day schedule is simply too restrictive. By giving the Legislature an extra 69 days to respond, the bill would ensure that the Legislature has a real opportunity to participate in the process. In fact, the time period proposed in the bill is similar in total to that allowed before the 1999 amendments, when JCAR had two months to consider a rule (although it could extend that period by up to one month), and the Legislature had 60 days to approve a rule if JCAR had disapproved the rule or reached an impasse.

Further, the APA allows an agency to promulgate an emergency rule without following the Act's notice and participation procedures, if doing so is necessary to preserve the public health, safety, or welfare and the Governor concurs in the finding of an emergency.

Opposing Argument

Some might say that any time limit is meaningless. If there is significant objection to an adopted rule, the Legislature can at any time repeal or amend the statute under which the rule was promulgated.

Response: The Legislature should be able to prevent the adoption of a proposed rule, short of repealing or amending a statute. Repealing or amending a statute in order to remove an objectionable rule could unnecessarily alter or eliminate a good and useful law.

Legislative Analyst: George Towne

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.