

Legislative Analysis



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APA AMENDMENTS

House Bill 4240 (Substitute H-2)
Sponsor: Rep. Ken Goike

House Bill 4500 (Substitute H-2)
Sponsor: Rep. Eileen Kowall

House Bill 4326 (Substitute H-2)
Sponsor: Rep. Jeff Farrington

House Bill 4573 (Substitute H-2)
Sponsor: Rep. Gail Haines

Committee: Regulatory Reform
First Analysis: 6-2-11

BRIEF SUMMARY: These bills make a number of changes to the Administrative Procedures Act (APA). These include, among other things, prohibiting an agency from promulgating a rule more stringent than the applicable federally mandated standard unless specifically authorized by statute; making agency review of rules more systematic and placing priority on reviewing the rules with the greatest impact, both in terms of the number of individuals and entities affected and the cost of compliance; reducing the burden new or existing rules have on small businesses; and making bulletins, interpretative statements, guidelines, and similar agency documents advisory rather than allowing them to have the force and effect of law.

FISCAL IMPACT: The bill would increase the costs of processing administrative rules by the several departments and agencies.

THE APPARENT PROBLEM:

According to committee testimony, critics of state government believe that excessive regulations hamper the growth and development of small businesses and prevent new businesses from locating in Michigan. As provided in statute, state agencies have the authority to promulgate rules to implement and run the programs they are required to oversee. Some people believe the agencies have exceeded their authority and have implemented rules that are overly burdensome. This package of bills is designed to address those concerns by limiting the ability of an agency to promulgate rules, requiring the periodic reviews of rules to assess their impact on businesses, limiting the authority of operational memos and bulletins so that they will not have the effect of law, and prohibiting agencies from issuing rules that are more burdensome than federal standards. It is believed these measures will reduce the regulatory burden businesses are facing and create a better overall business climate, as well as bringing more accountability to the rule-making process by transferring more of the authority for establishing regulations back to the Legislature.

THE CONTENT OF THE BILL:

House Bill 4240 (H-2) would amend Section 32 of the Administrative Procedures Act to include the following provisions:

- A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is considered merely advisory and will only be binding on the agency and will not be given the force and effect of law. An agency cannot rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or not act if the decision is subject to judicial review.
- When a statute allows an agency to proceed by rule-making or by order and the agency proceeds by order instead of rule-making, the order will not be given general applicability to those who were not parties to the proceeding or contested case.
- A rule cannot exceed the rule-making delegation provided for in the statute that authorizes the rule-making.

It would also amend Section 40 to include the following:

- When an agency proposes to adopt new rules that will apply to small businesses and the rule will have a disproportionate impact on small businesses, the agency must consider exempting the small businesses. If the agency does not exempt small businesses it must reduce the economic impact of the rule by doing all of the following:
 - Identify and estimate the number of small businesses affected by the proposed rule and its probable effect on small businesses.
 - Establish differing compliance or reporting requirements or timetables for small businesses under the rule after projecting the required reporting, record keeping, and other administrative costs.
 - Consolidate, simplify, or eliminate the compliance and reporting requirements for small businesses and identify the skills necessary to comply with the reporting requirements.
 - Establish performance standards to replace design or operational standards required in the proposed rule.
- The above factors must be specifically addressed in the regulatory impact statements required under Section 45.

Currently, if appropriate in reducing a rule's disproportionate economic impact on small business, an agency may classify small businesses as: (1) having 0-9 full-time employees; (2) 10-40 employees; or (3) 50-249 full-time employees. The bill would require the use of these classifications.

House Bill 4326 (H-2) would amend Section 32 of the APA by adding:

- Except for an emergency rule promulgated under Section 48, if the federal government has mandated Michigan to promulgate rules, an agency cannot promulgate or adopt a rule more stringent than the applicable federally mandated standard unless specifically authorized by Michigan statute.
- Except for an emergency rule promulgated under Section 48, if the federal government has not mandated Michigan to promulgate rules, an agency cannot promulgate or adopt a rule more stringent than the applicable federal standard unless specifically authorized by Michigan statute.

House Bill 4500 (H-2) amends Section 53 of the APA by adding the following:

- The annual regulatory plan would have to include the rules the agency expects to review in the next year.
- In reviewing rules as part of the annual regulatory plan, first priority is to be given to rules that directly affect the greatest number of businesses, groups, and individuals and those rules that have the greatest actual statewide compliance costs for businesses, groups, and individuals. A rules review must include the following information:
 - Whether there is a continued need for the rules.
 - A summary of any complaints or comments received from the public concerning the rules.
 - The complexity of complying with the rules.
 - Whether the rules conflict with or duplicate similar rules or regulations adopted by the federal government or local units.
 - The date of the last evaluation of the rules and the degree to which technology, economic conditions, or other facts have changed regulatory activity.
- Each agency would be required to post a link on its website to the Office of Regulatory Reinvention (ORR) website.

House Bill 4573 (H-2) would amend multiple sections of the APA to include the following:

- Agencies would have to include the *decision record* (if applicable) in a request for rule-making.

"Decision Record" means, in regard to a request for rule-making where an agency receives recommendations or comments by an advisory committee or other advisory entity created by statute, both of the following: (1) the minutes of all meetings related to the request for rule-making and (2) the votes of members.

- If an agency receives recommendations or comments by any advisory committee or other advisory entity created by statute regarding a request for rule-making, the advisory committee or entity must provide the agency with a decision record.
- The Office of Regulatory Reinvention would not be required to approve a rule-making request and could only do so after it indicates in its response to the agency requesting rule-making that there are appropriate and necessary policy and legal bases for approving the request. Additionally, ORR must provide a written or electronic response to a request that specifically addresses whether the request has appropriate and necessary policy and legal bases for approving the request.
- The regulatory impact statement would have to include:
 - A comparison of the proposed rule to standards in other states in the Great Lakes region or other application region and whether the rule exceeds standards in those states.
 - An identification of the sources the agency relied upon in compiling the regulatory impact statement, including the methodology used in determining the existence and extent of the impact of a proposed rule and a cost benefit analysis of the proposed rule.
 - A detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule upon small businesses
- An agency would have to post the regulatory impact statement on its website 10 days prior to a public hearing.

The APA currently provides that unless an exclusive procedure or remedy is provided by statute, the validity or applicability of a rule may be determined in an action for declaratory judgment if the court finds the rule or its application interferes or impairs, or threatens to interfere or impair, the legal rights of the plaintiff. HB 4573 would amend that provision so that the failure of an agency to accurately assess the impact of a rule on businesses, including small businesses, in the regulatory impact statement would also be taken into account in judging the validity or applicability of a rule.

BACKGROUND INFORMATION:

The reorganization of the Department of Energy, Labor, and Economic Growth into the Department of Licensing and Regulatory Affairs (LARA), and the renaming of the regulatory office as the Office of Regulatory Reinvention (ORR), is contained in Executive Order 2011-5. It states the ORR is responsible for completing a systematic review of all existing and proposed rules and rule-making processes, and is to use the following criteria to evaluate all promulgated and proposed rules: (1) the health or safety benefits of the rules; (2) whether the rules are mandated by any applicable constitutional or statutory provision; (3) the cost of compliance with the rules, taking into account their complexity, reporting requirements and other factors; (4) the extent to which the rules conflict with or duplicate similar rules adopted by the state or federal government; (5) the

extent to which the rules exceed national or regional compliance requirements; (6) the date of the last evaluation of the rules and the degree to which technology, economic conditions, or other factors have changed regulatory activity since the last evaluation; and (7) other changes since implementation that demonstrate there is no continued need for the rules. In addition to the systematic review of rules, the ORR also has authority to direct targeted reviews of select areas using the newly established Advisory Rules Committees.

The ORR is also responsible for ensuring all rule-making follows with the "best regulatory management practices" as described in EO 2011-5, by requiring all departments and agencies to:

- Complete a detailed cost-benefit analysis for all proposed rules. They must specify the methodologies used in determining the existence of the costs and benefits and an assessment of any disproportionate impact.
- Establish broadly representative stakeholder advisory groups and seeking input of these groups on proposed rules as the department deems appropriate.
- Detail provisions in rules that exceed federal or regional standards and explain the reasons for the deviation and the specific costs and benefits of the deviation.

A similar package of bills recently passed the Senate: Senate Bills 271-274, 277-279.

House Bill 4240 is similar to SB 272, HB 4500 is similar to SB 278 (S-1), HB 4573 is similar to SB 271 (S-1), and HB 4326 is contained entirely within SB 272.

As part of the package, the Senate also passed SB 277 (S-1) and 279 (S-1), which are nearly identical to HB 4016 (H-2) and 4017 (H-1). These two House Bills provide for a random sampling process to be used in determining inspections under NREPA and require the DEQ to complete process improvements of major programs they administer under NREPA. For complete analyses of HB 4016 - 4017 please see:

<http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-4016-3.pdf>

FISCAL INFORMATION:

The bill would increase the costs of processing administrative rules by the several departments and agencies. While current law requires departments and agencies to consider the impact of proposed administrative rules on small businesses, this bill would require a more detailed review of proposed rules on effected entities. The bill would also require a more expansive review of proposed administrative rules—including comparison of similar rules with neighboring states and applicable federal rules—as well as a cost-benefit analysis of the proposed rules. This provision would increase departmental and agency administrative costs by a relatively minor amount. The cost-benefit analysis would tend to increase costs for the promulgating agencies, particularly for more complex rule sets, as agencies could find it necessary to contract with industry experts to

assist in the analysis. Technically, the cost-benefit analysis requirement would impose no additional costs on the promulgating agencies as Executive Order 2011-5 already requires completion of a cost-benefit analysis for all proposed rule sets.

The bill also restricts the ability to departments and agencies in promulgating administrative rules that are more stringent than applicable federal standards. This provision would have an indeterminate fiscal impact on the state and local units, depending on how it ultimately impacted rules promulgated by the several departments and agencies. Recent experiences with some agencies promulgating rules that have (or would have) exceeded the applicable federal requirements have yielded divergent opinions on the cost impact of those rules, with rules potentially resulting in cost increases on regulated industries (under one view) and cost savings (under another view).

ARGUMENTS:

For:

Supporters of this legislation believe overly stringent rules make Michigan less attractive than neighboring states when trying to attract new businesses. They believe the bills will reduce the regulatory burden on businesses, particularly small businesses, and make Michigan more competitive with others in the region.

Committee testimony suggested that small businesses in Michigan feel a disproportionate impact when new rules are issued. A study conducted by the Small Business Administration showed that small businesses experience higher costs to comply with regulations. For example, the study states "In the face of yet higher costs of federal regulations, the research shows small businesses continue to bear a disproportionate share of the federal regulatory burden. More specifically, the total cost of federal regulations has increased to \$1.75 trillion, while the updated cost per employee for firms with fewer than 20 employees is now \$10,585 (a 36% difference between the costs incurred by small firms when compared with their larger counterparts)."¹ Lessening regulatory burdens, especially for small businesses, is thought likely to create a better overall business climate that will help attract new businesses and allow current businesses to grow and expand.

There is concern that too much authority for regulation has been surrendered by the Legislature and delegated to state agencies and to the rules that are formulated and implemented by bureaucrats. By restricting the rule-making authority of the agencies and putting more responsibility on the Legislature, it is thought this legislation will bring transparency and accountability to the rule-making process that is currently lacking. For example, the legislation would not allow state regulators to adopt standards more stringent than analogous federal standards unless the statute in question provides this authority.

¹ It is important to note this study was done with respect to the impact that *federal* regulatory standards have on small businesses. The report, titled "The Impact of Regulatory Costs on Small Firms" can be downloaded at www.sba.gov/advo/research/rs371tot.pdf.

Additionally, there is concern that the beneficial changes recently made to the rules process by Governor Snyder's Executive Order 2011-5 could easily be changed by a new governor. Many feel there is a need to place the changes found in EO 2011-5 into statute. It is thought this would provide a more stable business climate and provide for a clearer rule-making process.

Against:

Concerns have been raised about the negative impact not allowing for rules more stringent than federal standards could have on Michigan's ability to protect its natural resources and the health and safety of the public. It was noted during testimony that federal standards are intended to be a baseline that individual states cannot fall below. These baseline levels were enacted with the intent that individual states could implement more stringent regulations that fit their unique environments. Not allowing the promulgation of rules more stringent than federal standards could diminish Michigan's ability to protect its natural resources. Opponents say federal policies were written without specific knowledge about what regulations are best for Michigan. There may be instances when state agencies/commissions, as they have done in the past, will need to issue rules exceeding federal standards in order to act quickly to protect the health and safety of Michigan's citizens.

Concerns also have been raised that this legislation would usurp power from the governor, and reduce his or her ability to quickly respond to environmental emergencies. Committee testimony noted the situation that arose in 1976 when then-Governor William Milliken banned phosphorus from laundry detergents—because the legislature did not act—to combat algae blooms in Lake Erie. It is thought a governor might not be able to move so quickly to address a similar issue if this legislation is passed.

Further, some feel this legislation is unnecessary because many of its provisions are provided for in Governor Snyder's Executive Order 2011-5. Section III. A reads: "*the Office of Regulatory Reinvention shall be responsible for completing a systematic review of all existing and proposed rules and rule making processes.*" Opponents feel the ORR should be allowed to complete their review before statutory changes are made to the rule-making process. See ***Background Information***.

POSITIONS:

The National Federation of Independent Business - Michigan supports the bill. (5-18-11)

The Michigan Manufacturers Association supports the bill. (5-25-11)

The Michigan Association of Home Builders supports the bills. (5-25-11)

The Telecommunications Association of Michigan supports the bills. (5-18-11)

The Michigan Farm Bureau supports the bills. (5-18-11)

The Detroit Regional Chamber supports the bills. (5-25-11)

The Michigan Chemistry Council supports the bills. (5-25-11)

The Michigan Bankers Association supports the bills. (5-25-11)

The Michigan Chamber of Commerce supports the concept of the bills. (5-18-11)

The Office of Regulatory Reinvention is neutral on the bills. (5-18-11)

The Sierra Club of Michigan opposes the bills. (5-18-11)

The Michigan Environmental Council opposes the bills. (5-25-11)

Clean Water Action opposes the bills. (5-18-11)

The Michigan Laborers' District Council opposes HB 4326. (5-18-11)

The United Auto Workers opposes HB 4326. (5-25-11)

The Michigan State AFL-CIO opposes HB 4326. (5-25-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.