

LFC Requester:	Marty Daly
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**AGENCY BILL ANALYSIS
2017 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original <input type="checkbox"/>	Amendment <input checked="" type="checkbox"/>	Date <u>2/27/17</u>
Correction <input type="checkbox"/>	Substitute <input type="checkbox"/>	Bill No: <u>HB58HSIVC/s/a/HJC</u>

Sponsor: <u>House State Government, Indian and Veterans Committee</u>	Agency Code: <u>924</u>
Short Title: <u>RULEMAKING REQUIREMENTS</u>	Person Writing: <u>Matt Pahl</u>
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
See fiscal analysis below	See fiscal analysis below	Recurring	

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	47,350	47,350	47,350	142,050	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis of HB58JC1

- 1. Amends definition of "provide to the public" replaces "a postcard notice with" with "written notice that includes, at a minimum,"**
- 2. Removes "order".**
- 3. Amends the definition of "rule" and inserts "those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and".**
- 4. Amends the definition of "rule" and inserts "and renewals".**
- 5. Amends the definition of "rule" and inserts "Including affecting persons served by the agency".**
- 6. Adds a timeline to Section 3 (D) by inserting "Within thirty days of receiving that state records administrator's record of a correction, the agency shall provide to the public notice of the correction in the same manner as the agency used to give notice of the rulemaking proceeding pursuant to Section 4 of this 2017 act."**
- 7. Adds flexibility to Section 6 regarding rulemaking proceeding. Inserts "Each agency shall determine, in accordance with governing statutory and case law the manner in which parties to the proceeding and members of the public will be able to participate in public hearings. All public hearings shall be conducted in a fair and equitable manner."**
- 8. Adds flexibility to Section 6 regarding procedural roles. Inserts "Each agency may adopt its own procedural rules or continue in effect existing rules, which shall provide at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general".**
- 9. Removes Sections 11, 12, and 13 entirely.**

Synopsis: House Bill 58 (HB-58) (substitute) amends an existing section of the State Rules Act relating to rulemaking requirements for proposing, adopting, amending or repealing rules. HB-58 adds an automatic expiration of agency rules. Additionally, amendments and new material call for more information to be provided to the public when proposing and adopting, amending or repealing, a rule. Additionally, amendments give state records administrators the power to make non-substantive corrections in filed rules and the power to request that an agency review any existing rule that is believed to conflict with statute.

FISCAL IMPLICATIONS

In HB58JC1, the change to Section 1 (E) (6) would not change the fiscal impact of sending out a written notice stated in the previous analysis. For the PED, a letter and postcard are the same cost (\$0.465).

Postcard Notice: 4,000 people provide postal address X \$.465 X 10 = \$18,600

There is a significant cost increase related to the automatic expiration required in HB-58. The retroactive piece of this automatic expiration states that no more than 20% of preexisting rule shall expire in the same fiscal year. Title 6 in NMAC houses rule promulgated by the PED for primary and secondary education. There are over 35 chapters in Title 6. Each chapter has anywhere from 1 to 20 parts. Parts can range from 1 page to over 100 pages. The cost of filing rule is currently \$3.00 per columnar inch which is approximately \$60.00 per page.

20% of 35 chapters = 7 chapters

Average 5 parts in each chapter = 30 parts

Conservative average of 15 pagers per part = 450 pages

450 pages x \$60.00 = **\$27,000**

30 parts x \$100.00 (cost for public notice in NM Register and Albuquerque Journal) = **300.00**

If the department were to readopt 20% every fiscal year at a rate of over \$30,000 in our current fiscal climate, there would be little room for additional department determined rulemaking which is a violation of 22-2-1 NMSA 1978, 22-2-2 NMSA 1978, and 22-2C-4 NMSA 1978.

There is a cost increase related to the requirement of providing more information to the public. Lengthier public notices published in the NM Register and the newspaper will increase the cost ([New Material] Section 4, paragraph A, subparagraph 1-7). Filing an explanatory statement in addition to the rule will increase the cost which is currently \$3.00 per columnar inch.

Additionally, the requirement of sending postcard notices will increase the cost relating to public notification of proposed rulemaking and other rulemaking information (Section 1, paragraph E, subparagraph 6). The normal rate of sending a post card is 46.5 cents per postcard. The list required by this statute seems to imply that a list would continually grow as people are interested.

Further, to the extent that the new record-keeping requirements involve more extensive record-keeping than the Agency may have previously been engaging in, there will be increased cost, related to organizing and retaining appropriate files.

A Department actively engaging in rule changes would experience significant increase in costs. If the Public Education Department engaged in 10 rule changes in a year, the cost would accumulate to nearly \$20,000 annually. These costs are itemized below:

Explanatory Statements: \$6.00 for two columnar inches per notice X 10 = \$60.00;

Postcard Notice: 4,000 people provide postal address X \$.465 X 10 = \$18,600

Also, review upon the request of the state records administrator, for conflict with statute, to the extent that it requires additional review of a rule, outside of normal and regular Agency planning, will lead to additional cost to the Agency.

SIGNIFICANT ISSUES

In HB58JC1, the change to Section 1 (E) (6) would increase agency cost and workload. Notification to the public pertaining to nonsubstantive changes is unnecessary and not worth the potential cost and workload. In addition to being burdensome to state agencies, the public notification of grammar, spelling, and format changes does not have any real benefit to the public and may cause confusion because it is likely that people will see that a rule is being amended and will want to be heard on substantive issues.

HB58JC1 inserts "those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and" in Section 1 (F) which creates confusion because nonregulatory guidance is used to interpret a federal or state legal mandate or other applicable law and should not be considered "rule".

Amendments to Section 2 (D) require that the Department provide public notice of a nonsubstantive correction in the same manner as a rulemaking notice within 30 days of the notification of the correction. This does not give the agency adequate time to respond to the correction in the case that the agency does not agree with the request. The PED has an internal routing process that takes 30 days prior to any public release regarding rule. This mandate does not allow for that internal process to take place. Additionally, the PED is concerned with the level of responsibility being granted to the state records administrator in that they are not mandated to collaborate with department on matters of concern.

HB58JC1 eliminates Sections 11, 12, and 13 entirely which removes all mandates surrounding the automatic expiration of agency rules previously laid out in HB 58. This is significant improvement and will continue to allow state agencies to promulgate rule and maintain local control. This elimination resolves the issue of forced rulemaking which would have gravely impacted the autonomy of state agencies.

HB 58 requires an automatic expiration of agency rules in which all rules expire no more than twelve years after adoption and all readopted rules expire no more than 12 years after readoption. Additionally, HB 58 requires agencies to provide additional information in the Notice of Proposed Rulemaking - summary, explanation, citation of legal authority, and citation of technical information. This will provide the public with more information and justification from the agency but will increase the cost of publication and significantly slow the process of rulemaking for the agency.

The arbitrarily determined expiration dates required in HB 58 are irresponsible and will negatively impact current agency practice. School districts and charters depend on state regulation to help clarify statute and layout implementation practices. HB 58 requires unnecessary changes to the way in which rulemaking is notified. HB 58 requires that agencies participate in more frequent rule change while simultaneously making the notification and adoption process more challenging and costly to the district.

Section 11 includes the automatic expiration of agency rules no more than twelve years after adoption which will be overly burdensome for agencies. The fiscal impact and impact on man-hours will be extensive and based on an arbitrary date set forth by this bill. An automatic expiration in state statute limits the department's power to promulgate when the department sees fit. The department's right to promulgate rule as it deems necessary and appropriate is codified in 22-2-1 NMSA 1978, 22-2-2 NMSA 1978, and 22-2C-4 NMSA 1978. Requiring rule change based on an expiration not fully determined by the PED is a violation of the statutory authority given to the department to promulgate rule. This is in clear contradiction with 22-2-1 NMSA 1978 which states:

- A. *The secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.*
- B. *The department may:*
 - (1) *adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary;*

Section 12 requires the automatic expiration of agency rules adopted prior to July 1, 2016. This section requires that agencies do a full revamp on the New Mexico Administrative Code based on a schedule developed by the state records administrator even though the state records administrator does not hold expertise equivalent to the agency that promulgates rulemaking. Rulemaking is an important process that takes time, stakeholder engagement, research, and strategy. Adopting quality rule in response to a need for clarification should be the standard. HB 58's requirement would call for undue rule change that would not necessarily improve the quality of rule but would assuredly be costly for agencies. For example 6.20.4 NMAC, DEFINITIONS OF FULL-TIME AND PART-TIME SCHOOL INSTRUCTORS is an example of rule promulgated by the PED at a time when the difference between a full-time and part-time school instructor needed clarification. This rule was adopted in 2010. Under the mandates of HB-58, the PED would be required to spend the estimated cost of over \$200.00 to readopt this rule, even if the status quo continued to prove effective for the Department and its employees.

The requirement in Section 1 of distributing rulemaking information to any parties who have previously requested notification of rulemaking information will be burdensome on the agency. The term "rulemaking information" is not defined.

Further, this level of distribution required in Section 1 is unnecessary considering the notices for rulemaking for the PED are published in the NM Register, the Albuquerque Journal, and on the PED website.

Section 1(E) requires the Agency to provide a copy of rulemaking information to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees. Unlike the other provisions requiring the Agency to distribute rulemaking information, this provision does not state in what form the information must be made available.

Section 2 requires that the agency promulgating a rule shall include a concise explanatory statement when filing the rule for publication. This will provide more information to the public concerning the reasoning behind the rule change. Additionally, this section gives the state records administrator the power to make minor, non-substantive corrections in spelling, grammar and format in file rules. This could potentially reduce errors and long-term costs. Currently, all spelling and grammar changes must go through the entire rulemaking process.

Section 3 requires that an agency adopt a rule within two years after the notice of proposed rulemaking is published in the NM Register. This requirement is reasonable and one which the PED currently follows.

Section 7 outlines the requirements for the explanatory statement to be submitted at the time of filing. Providing clarifying information/reasoning to the public is beneficial for practical implementation of rule. However, stating statutory authority and reason for not accepting substantial arguments is redundant considering the other requirements in this bill. Additionally, the criteria for what determines a "substantial argument" are not clear; and what constitutes a "substantive change" is arguably vague.

Section 3, paragraph D is confusing. A rule is not considered "adopted" until it is filed with the state records administrator. However, this section states that an agency must file 15 days after the adoption of the rule. The proposed bill should include definitions for both "adopted" and "filed" in the definitional section and should use the terms throughout the bill consistently with such definitions.

Section 4 outlines what the notice of proposed rulemaking shall include. Although a summary of text, explanation of purpose, citation of legal authority, and citation to technical information will provide

the public with more information pertaining to the proposed rule change, the inclusion of this information in a notice will increase the cost of publication for the agency. Additionally, some of this information is redundant because it can be found in the draft rule which is made available to the public.

Section 5 requirements are in alignment with current rulemaking practices at the PED.

Section 9, a new section of the State Rules Act addresses potential conflicts between agency rules and “statute.” This section does not explain whether it is intended to address conflicts with State statutes, Federal statutes, or both.

Section 9(C) uses the vague phrase “logical outgrowth of the action proposed in the notice” to define when a final rule may contain material that differs from the action proposed in the notice of proposed rulemaking. If the different material is a “logical outgrowth of the action proposed in the notice” and a detailed justification is included in the rulemaking record, it will be allowed. This standard could be difficult to apply.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

This bill does not include information pertaining to rulemaking completed after July 1, 2016 prior to July 1, 2017.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Agencies will continue to promulgate rule that aligns with strategic plans and administration vision. Agencies will continue to control timelines of rule adoptions that fall within their expertise.

AMENDMENTS