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Bill Analysis
Legislative Service Commission

Sub. S.B. 11

123rd General Assembly
(As Passed by the Senate)

Sens. Kearns, Carnes, DiDonato, Blessing, Cupp, Drake, McLin, Oelslager, Schafrath, Wachtmann, Latell, Furney, Gardner, Brady, Hagan, Herington, Hottinger, Mallory, Spada, Fingerhut, Prentiss

BILL SUMMARY

- Requires the Director of the Legislative Service Commission to publish the Register of Ohio, an electronic publication to give public notice of and information about agency rule-making processes.
- Requires agency rule-making hearings to be conducted before the hearings of the Joint Committee on Agency Rule Review on the same proposed rules, amendments to rules, or rescissions of rules.
- Requires agencies to prepare guides to their rule-making processes, which must be designed to assist members of the public who participate in rule-making.
- Authorizes the use of advisory committees to advise agencies in the development of rules, amendments to rules, and rescissions of rules.
- Authorizes agencies to permit public comment before and after rule-making hearings.
- Authorizes the designation of substitute JCARR members when members are absent.
- Modifies the conditions under which compensation is paid to JCARR members.
- Provides for a phase-in period leading up to an eventual requirement that all rule-related documents and responses to them be made exclusively in electronic form.

- Makes other changes relative to agency rule-making.

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CONTENT AND OPERATION

Requirement for electronic publication of the Register of Ohio

Public notices: agency rule action

Under existing law, reasonable public notice must be provided at least 30 days before an agency hearing to adopt, amend, or rescind an agency rule. The notice must be given in the manner and form and for the length of time that the agency determines and sets forth in an agency rule and must provide certain information required by law. (Sec. 119.03(A).)

The bill requires an agency to give that public notice, on and after April 1, 2000, in the Register of Ohio that is required by the bill (see below), in the form the agency determines. In addition, the bill authorizes the agency to give whatever *other notice* it reasonably considers necessary to ensure notice *constructively* is given to all persons who are subject to or affected by a proposed rule, amendment, or rescission. Although the bill continues existing law's requirement that an agency provide a copy of the public notice to *any person who requests it* and pays a reasonable fee for it (not to exceed the cost of copying and mailing), the bill removes the current authorization for mail notification to all *subscribers on a mailing list* and to persons who request notice and provide self-addressed stamped envelopes. These provisions of the bill take effect on April 1, 2000. (Sec. 119.03(A); Section 10 of the bill.)

Nature of the "Register of Ohio" and LSC Director duties

The bill requires the Director of the Legislative Service Commission (LSC) to publish, on and after April 3, 2000, the Register of Ohio to inform the public about agency rule-making processes. The Register will be an electronic publication that functions as a gazette to the public for notice of and information about rule-making processes. It will include all rule-making documents required by statute to be published in the Register, including the following documents that the bill requires the LSC Director to publish in it: (1) the full text of the original and each revised version of a proposed rule, amendment, or rescission, (2) the full text of a public notice, (3) the full text of a rule summary and fiscal analysis that is filed with the LSC Director, (4) the full text of an emergency rule, amendment, or rescission, and (5) the agency rule-making guides required by the bill (see "**Guides to agency rule-making process**," below). (Secs. 103.051, 103.13(J), 119.03(B) and (F), and 119.0311; Section 9 of the bill.)

The LSC Director must display the Register free of charge on the Internet and must ensure that printed copies of all or part of a document published in the Register can be easily produced by users of the Internet (sec. 103.051). The bill, in applying different public notice requirements through varying effective dates explained in this analysis (see "**Notice by publication in the Register of Ohio; name of the associated law**," below), gradually phases in the Register as the *single source of public information* about rule-making proceedings (Section 13 of the bill).

The LSC Director, taking into consideration the Register's public notice and information functions, must update the Register at reasonable intervals, but no less often than weekly. The LSC Director must establish a reasonable deadline (apparently for the receipt of documents to be published) before each updating. If the LSC Director receives a document on or before a deadline, it must be

published in the Register at the next updating. The LSC Director must purge a document from the Register when its display no longer serves the Register's public notice and information functions. (Sec. 103.051.)

The LSC Director is required to provide, upon request, any person with a printed copy of all or part of a document published in the Register. The LSC Director may charge and collect a fee for this service, but the fee may not exceed the actual cost of printing and delivering the printed copy to the person. Fees so collected by the LSC Director must be deposited in the state treasury to the credit of the Register of Ohio Fund, which the bill creates. Moneys in the Fund, including investment earnings credited to the Fund, must be used by the LSC Director to defray the cost of publishing the Register. (Secs. 103.051 and 103.054.)

The bill authorizes the LSC Director *to request* an agency to provide the LSC Director with assistance that is within the agency's competence and that is reasonably necessary to ensure the LSC Director's successful, efficient, and timely electronic publication of the Register. In addition, an agency *must provide* the LSC Director with assistance that is within the agency's competence and that the LSC Director requests with respect to electronic publication of the Register. (Secs. 103.052 and 119.038.)

The bill also authorizes the LSC Director to recover a portion of the cost of the Register's publication by seeking *reimbursement from an agency* of the actual costs that the LSC Director incurs in publishing that agency's documents in the Register. The amount sought for reimbursement must be an amount proportional to the Internet space allocated to the agency for publishing the agency's documents in the Register and must be reduced by the value of the assistance that the agency has provided to the LSC Director in the publication of the Register. The LSC Director must deposit those reimbursements into the state treasury to the credit of the Register of Ohio Fund. The bill correspondingly requires an agency to pay the LSC Director the amount the Director seeks as reimbursement for the actual cost of publishing the agency's documents in the Register, which payment must be by means of an intrastate transfer voucher. (Secs. 103.053 and 119.039.)

Significant Register dates

All of the provisions explained above pertaining to the Register (secs. 103.051, 103.052, 103.053, 103.054, 119.038, and 119.039) take effect July 1, 1999. Beginning on that date, the LSC Director also is required to *proceed to set up* the Register for publication. The LSC Director must first publish the Register on April 3, 2000. (Section 9 of the bill.)

The requirement that public notices, original and revised versions of proposed rules, and rule summary and fiscal analyses be published in the Register applies to both of the following: (1) filings of these documents that occur on or after April 1, 2000, in the course of rule-making proceedings that are pending on that date and (2) filings of these documents in rule-making proceedings that are commenced on or after that date (Section 10 of the bill).

Notice by publication in the Register of Ohio; name of the associated law

The bill provides, effective January 1, 2001, that, unless explicitly provided otherwise by statute, if a document is required by law to be published in the Register of Ohio, its publication in the Register is sufficient to give notice of the content of the document to a person who is subject to or affected by the content. Until the document is so published, its content is not valid against a person *who does not have actual knowledge* of the content. (Sec. 119.037; Section 12 of the bill.) The bill provides that these provisions, in conjunction with the other provisions of the bill pertaining to the Register (secs. 103.051 to 103.054, 119.038, and 119.039) are to be known as "The Register of Ohio Act" (Section 27(A) of the bill).

On and after January 1, 2001, it is sufficient for an agency to give public notice of intended rule adoption, amendment, or rescission action *only in the Register*. From April 1, 2000, until January 1, 2001, it is not sufficient for an agency to give that public notice only in the Register; between these dates, an agency must give that public notice in the Register and continue to give that public notice in the same manner as it gave notice under division (A) of section 119.03 as it existed before April 1, 2000. Thus, for example, if an agency provided mail notice of intended rule adoption, amendment, or rescission action to subscribers under that division, the bill requires it to continue to do so until January 1, 2001. On and after April 1, 2000 and until January 1, 2001, the agency *also* must give the public notice of intended rule adoption, amendment, or rescission action in the Register. On and after January 1, 2001, it only needs to give the public notice of intended rule adoption, amendment, or rescission action in the Register. (Section 11 of the bill.)

Changes in procedure for the adoption, amendment, or rescission of any rule

Public and other notice

Under existing law, an agency must give, as part of its public notice, a notice of the date, time, and place of a hearing on a proposed rule-making action. The hearing must not be earlier than 30 nor later than 50 days after the proposed rule, amendment, or rule to be rescinded is filed with the Secretary of State and the

LSC Director. The bill changes the time frame for an agency's hearing to *no earlier than the 31st nor later than the 40th day* after those filings. (Sec. 119.03(A)(4).)

Under existing law, in addition to the required public notice of a proposed rule-making action, an agency may give whatever other notice it considers necessary, and each agency must adopt a rule setting forth in detail the method it will follow in giving public notice about the adoption, amendment, or rescission of its rules. Under the bill, as previously noted under "**Public notices: agency rule action**," in addition to giving public notice in the Register of Ohio, an agency may give whatever other notice it reasonably considers necessary to ensure notice constructively is given to all persons who are subject to or affected by a proposed rule, amendment, or rescission. The bill also repeals the existing requirement for a rule detailing an agency's method of giving public notice of proposed rule-making action. (Sec. 119.03(A).)

Conduct of hearing and related matters

Under existing law, on the date and at the time and place designated by the public notice, an agency must conduct a public hearing, and any person affected by the proposed rule-making action may appear and be heard. The person, the person's attorney, or both may present the person's position, arguments, or contentions orally or in writing and may offer and examine witnesses and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful. The bill continues these provisions and also allows an agency to permit persons affected by a proposed rule, amendment, or rescission to present their positions, arguments, or contentions in writing, not only at the hearing, but also for a reasonable period before, after, or both before and after the hearing. A person who presents a position, argument, or contention in this manner is not required to appear at the hearing. (Sec. 119.03(C).)

Under existing law, the testimony, rulings on admissibility of evidence, and proffers of evidence made at the hearing must be recorded by stenographic means and at the expense of the agency involved. The bill repeals an existing related requirement that an agency *pass upon the admissibility of evidence* and an existing related authority for a person to object to an agency's evidence ruling and to *proffer evidence* under certain circumstances to be made part of the record of the hearing. Accordingly, the bill requires only testimony to be recorded at a hearing, at the agency's expense. The bill also repeals the requirement for a "stenographic" recording of the testimony and thus is silent as to the manner or form of its recording. Finally, the bill requires an agency to transcribe a record that is "not sight readable" only if a person requests transcription of all or part of the record

and agrees to reimburse the agency for the costs of the transcription. The agency may require advance payment for all or part of the transcription costs. (Sec. 119.03(C).)

JCARR-related provisions

Under existing law, when an agency files a proposed rule, amendment, or rule to be rescinded (not otherwise excepted by the law) with the Secretary of State and the LSC Director, it also must file with the Joint Committee on Agency Rule Review (JCARR) two copies of the full text of the proposed rule, amendment, or rule to be rescinded. If the agency subsequently makes substantive revisions in that rule-making action, it must promptly file with JCARR two copies of the full text of the revised rule-making action, thereby superseding any earlier version of the proposed rule-making action. (Sec. 119.03(H).)

Under existing law, JCARR may recommend to the General Assembly the adoption of a concurrent resolution invalidating a proposed rule-making action on the basis of specified criteria. (See **COMMENT 1**.) The bill does not affect that recommendation authority but states that JCARR must not hold its public hearing on a proposed rule, amendment, or rescission *earlier than the 41st day after the original version of the proposed rule-making action was filed* with JCARR. Therefore, under the bill, JCARR's hearing must occur *after the agency's previously described public hearing*, because the bill requires the agency's public hearing to occur no earlier than the 31st day nor later than the 40th day after the filing of the proposed rule-making action with the Secretary of State and the LSC Director. (Sec. 119.03(A)(4) and (I).)

The effect of the above-described changes to the time frame for JCARR hearings is to shorten *from 59 to 25 days* the basic time period for JCARR to meet and review a proposed rule-making action and to recommend the adoption of a concurrent "invalidation" resolution. Currently, JCARR has 59 days from the time an original rule-making action is filed to recommend the adoption of a concurrent "invalidation" resolution, and, if a rule is refiled in revised form after the 30th day, the JCARR recommendation period is extended and ends 29 days after the date of refiling. The bill extends the end date for JCARR review from 59 to 65 days, by establishing a *65-day limit* for adoption of a concurrent "invalidation" resolution. In addition, the bill lengthens the time by which an extension is triggered by a refiling, so, under the bill, if a refiling occurs on the *36th day or later* after an original filing, JCARR has 30 more days for review. Because JCARR, under the bill, is prohibited from holding a public hearing on a proposed rule-making action until after the agency has held its public hearing on the rule-making action (which may be no later than 40 days after the original filing), JCARR may hold a public hearing no earlier than the 41st day after an original filing. This gives JCARR 25

days in which to meet and review a proposed rule-making action and to recommend the adoption of a concurrent "invalidation" resolution before the 65-day limit for adoption of a concurrent "invalidation" resolution occurs, provided an extension of time is not triggered by a refiling of a proposed rule-making action after 35 days from the original filing. (Sec. 119.03(I).)

Because JCARR's basic review period applies not only to rules adopted under the Administrative Procedure Act but also to rules adopted under the more abbreviated procedure of section 111.15, the bill makes a conforming adjustment to the time period under that section (sec. 111.15(D)).

The amendments to division (D) of section 111.15 and division (I) of section 119.03 of the Revised Code take effect at the earliest time permitted by law and first apply to rule-making proceedings that are subject to division (D) of section 111.15 or division (H) of section 119.03 of the Revised Code and that are commenced on or after that effective date. The amendments do not affect a rule-making proceeding that is subject to division (D) of section 111.15 or division (H) of section 119.03 of the Revised Code and that is pending on the amendments' effective date; the proceeding is to be carried through to completion under the applicable division as it existed at the time the proceeding was commenced and under division (I) of section 119.03 of the Revised Code as it existed at that time. (Sections 14 and 16 of the bill.)

Phase-in requirement for electronic rule filing

The bill requires the LSC Director to establish and maintain, and enhance and improve, an electronic rule-filing system connecting the following: (1) LSC, JCARR, the Secretary of State, and the Office of Small Business, (2) the Governor, the Senate and House of Representatives, and the clerks of the Senate and House of Representatives, (3) each agency that files rules and other rule-making and rule-related documents with LSC, JCARR, the Governor, the Secretary of State, the Office of Small Business, the General Assembly, or a committee of the Senate or House of Representatives under specified sections of law (secs. 103.05, 111.15, 117.20, 119.03, 119.031, 119.032, 119.0311, 119.04, 121.24, 121.39, 127.18, 4141.14, 5117.02, and 5703.14), (4) the several publishers of the Administrative Code, and (5) any other person or governmental officer or entity whose inclusion in the system is required for the system to be a complete electronic rule-filing system. The electronic rule-filing system is to enable rules and rule-making and rule-related documents to be filed, and official responses to these filings to be made, exclusively by electronic means. (Secs. 103.0511 and 103.13(K).) If there is an expected or unexpected shut down of the whole or part of the electronic rule-filing system, such as for maintenance or because of hardware or software failure, the LSC Director is authorized to temporarily

authorize an agency that is required to file rules and other rule-making and rule-related documents exclusively in electronic form, to file rules and other rule-making and rule-related documents in print form (sec. 103.0512). These provisions of law are designated as the "Electronic Rule-Filing Act" (Section 27(B) of the bill).

In order to accomplish the objective of exclusive rule-filing in electronic form on and after January 1, 2002, the bill provides an implementation schedule to be followed by the LSC Director. The schedule consists of an initial set up period, a testing period, and a final set up period. During the initial set up period, filings are to be made as under current law. The initial set up period begins no later than July 1, 1999, and must be completed by December 31, 2000. During the testing and final set up periods, the Governor and each agency must file rules and rule-making and rule-related documents in both paper and electronic form. Similarly, the LSC Director, JCARR, Secretary of State, Clerk of the Senate, Office of Small Business, General Assembly, committees of the Senate and House, and other participants in the system must respond to those filings in both paper and electronic form. On and after inauguration of the electronic rule-filing system, all filings and responses must be in electronic form. (Sections 18 through 24 of the bill.)

Accordingly, during the period beginning January 1, 2001, and ending December 31, 2001, all rule-making or rule-related documents and responses must be made in both print and electronic form. On and after January 1, 2002, these filings and responses must be made exclusively in electronic form. (Sections 5, 8, and 24(A) and (B) of the bill.)

Compensation of JCARR members

Existing law

Under existing law, JCARR members, when engaged in their duties as members of the committee on days when there is not a voting session of the member's house of the General Assembly, must be paid a per diem of \$150 and their necessary traveling expenses (sec. 101.35). This provision was enacted by Am. Sub. H.B. 215 of the 122nd General Assembly. Section 154 of that act stated that the compensation and reimbursement added by that act is available only to a JCARR member whose term in the General Assembly begins on or after the effective date of Section 154. This uncodified provision was added in recognition of Section 31 of Article II of the Ohio Constitution which prohibits members of the General Assembly from receiving an in-term increase in compensation or any allowance or perquisite.

Changes proposed by the bill

The bill repeals Section 154 of Am. Sub. H.B. 215 of the 122nd General Assembly and replaces it with a similar uncodified provision stating only that the \$150 per diem is available only to a JCARR member whose term in the General Assembly began on or after the effective date of Section 154 of that act (sec. 101.35; Sections 25 and 26 of the bill). (See **COMMENT 2.**)

Certain rules exempt from legislative review later subject to review

Under existing law, rules that must be adopted verbatim by an agency because of a federal law or rule generally are exempt from the rule review process (secs. 111.15(D)(5) and 119.03(H)(2)). The bill clarifies that, when the federal law or rule (pursuant to which the rule was adopted) expires, is repealed or rescinded, or otherwise terminates, the rule is thereafter subject to legislative review under division (D) of section 111.15 or division (H) of section 119.03 of the Revised Code (sec. 111.15(D), last paragraph, and sec. 119.03(H), last paragraph).

Guides to agency rule-making process

Purpose and content

The bill requires each agency to prepare and publish, and to revise and republish when necessary or advisable, a guide to its rule-making process. The guide is to assist members of the public who participate, or who may wish to participate, in the agency's rule-making. The guide must include the following: (1) a statement of the agency's regulatory mission, (2) a description of how the agency is organized to achieve its regulatory mission, (3) an explanation of the rule-making the agency is authorized or required to engage in to achieve its regulatory mission, (4) an explanation of the agency's rule-making process, (5) an indication of the points in time when the public may participate in that process, (6) an explanation of how the public can participate in that process at each indicated point of participation, and (7) other information the agency reasonably concludes will assist members of the public to meaningfully participate in the agency's rule-making. (Sec. 119.0311.)

Form, publication, and conformity

An agency is prohibited from adopting its guide by rule-making, but instead the guide must be a *narrative explanation* of the matters identified above. An agency must publish and republish its guide both in the Register of Ohio and as a printed pamphlet. An agency's failure to conform its rule-making process to its

guide is *not cause for invalidating* a rule, amendment, or rescission adopted by the agency. (Sec. 119.0311.)

Provision of guide copies

An agency is required to provide a copy of its guide, in pamphlet or preferably in electronic form, to the LSC Director. The LSC Director must publish the agency's guide in the Register of Ohio. (Sec. 119.0311.)

An agency also is required to provide a copy of its pamphlet guide to any person upon request. The agency may charge the person a fee for the copy, not to exceed the per copy cost of producing the pamphlet guide and the actual cost of delivering it to the person. (Sec. 119.0311.)

Name

The bill provides that these guide-related provisions of section 119.0311 are to be known as the "Guide to Public Participation in Rule-Making Act" (Section 27(C)).

Agency advisory committees

The bill authorizes an agency (1) to appoint an advisory committee to advise the agency concerning its development of a rule, amendment, or rescission and (2) to otherwise consult with persons representing interests that would be affected by a rule, amendment, or rescission if it were actually to be proposed and adopted. Upon an agency's request, the executive director or another officer or employee of the Ohio Commission on Dispute Resolution and Conflict Management may serve as a group facilitator for, but not as a member of, an advisory committee. (Sec. 119.035.)

Designation of substitute JCARR members and JCARR attendance of rule-making agency hearings

Existing law

Existing law provides for the creation of JCARR, consisting of five members from the House of Representatives and five members from the Senate. Six members are necessary for a quorum, and the concurrence of six members is required for the recommendation of a concurrent resolution invalidating a proposed or effective rule, amendment, or rescission. (Sec. 101.35.)

Changes proposed by the bill

The bill authorizes the President of the Senate or the Speaker of the House of Representatives, as the case may be, to designate a substitute when a JCARR member is absent. The substitute must be from the same House and political party as the absent JCARR member. The substitute is required to serve on JCARR in the JCARR member's absence and is entitled to perform the duties of a JCARR member and to receive the same per diem and necessary traveling expenses as the substitute would be entitled to receive if the substitute were a JCARR member (see previous discussion under "*Compensation of JCARR members*"). (Sec. 101.35.)

The President or Speaker is required to inform the JCARR Executive Director of a substitution. If the Executive Director learns of a substitution sufficiently in advance of a JCARR meeting, the Executive Director must publish notice of the substitution on the Internet and make reasonable effort to inform parties known by the Executive Director to be interested in the rules scheduled for consideration at the meeting, of the substitution. The Executive Director also must provide information about any substitution to any persons who inquire about the meeting. (Sec. 101.35.)

Finally, the bill also entitles JCARR members, the JCARR Executive Director, and JCARR staff "in their official capacities" to attend but not participate in a public hearing conducted by a rule-making agency on a proposed rule, amendment, or rescission (sec. 101.35).

COMMENT

1. Existing law *does not expressly require JCARR to hold a hearing* on an agency proposed rule-making action, but the law authorizes JCARR to recommend to the General Assembly the adoption of a concurrent resolution to invalidate a proposed rule-making action. In practice, JCARR holds such a hearing. Therefore, in practice, JCARR must hold the hearing prior to the deadline for the General Assembly's adoption of a concurrent "invalidation" resolution. Adoption of a concurrent resolution invalidating a proposed rule-making action must occur prior to the 60th day (not later than the 65th day under the bill) after an original filing or, if an agency makes a revised filing after 30 days (35 days under the bill) from the original filing, prior to the 30th day (not later than the 30th day under the bill) after the revised rule-making action is filed. (Sec. 119.03(I).)

2. This provision in Section 26 of the bill is silent as to the reimbursement of JCARR members for travel expenses. The implied effect is that all members of JCARR will receive travel expenses. It is unclear whether a court would consider

this payment to be unlawful under Section 31 of Article II of the Ohio Constitution.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 27
Reported, S. State & Local Gov't & Veterans Affairs	03-16-99	p. 200
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