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Legislative Service Commission

Sub. H.B. 685*

126th General Assembly
(As Reported by H. State Government)

Reps. Faber, Blasdel, DeWine, Flowers, Seitz, Carmichael, C. Evans, Peterson, Daniels, Raussen, Raga

BILL SUMMARY

- Requires an agency that adopts rules under the Administrative Procedure Act to give a new public notice of, and to conduct a new public hearing on, the original version of a proposed rule whenever it is substantively revised after being published in the *Register of Ohio*.

- Requires the Joint Committee on Agency Rule Review (JCARR), in reviewing a proposed rule for consistency with legislative intent, to take into account a legislative policy that the regulatory burden of the proposed rule should not outweigh its regulatory benefit.

- Requires an agency to balance, in the rule summary and fiscal analysis (RSFA) for a proposed rule that is reasonably likely to have a significant economic impact on Ohio businesses, the regulatory burden and regulatory benefit of the proposed rule and, if the burden outweighs the benefit, to explain why that outweighing does not violate the legislative policy.

- Authorizes JCARR to postpone further consideration of a proposed rule that has an incomplete or inaccurate RSFA as an alternative to recommending invalidation of the proposed rule.

- Authorizes JCARR to postpone further consideration of *any* proposed rule that has an incomplete or inaccurate RSFA.

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* *This analysis was prepared before the report of the House State Government Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Specifies that JCARR's consideration of a proposed rule that has been postponed resumes upon expiration of the postponement, and that the rule thereafter is to be treated as if it were the original version of the proposed rule.

- Requires an agency to cite, in the RSFA for a proposed rule, *all* rules that affect the subject of the proposed rule.

- Requires an agency to analyze, in the RSFA for a proposed rule, any significant economic impact the proposed rule is reasonably likely to have upon Ohio businesses.

- Requires an agency that is filing a proposed rule to consider whether the proposed rule is subject to small business review coordinated by the Office of Small Business or to review by the Department of Aging and to submit the proposed rule to either or both reviews if it is.

- Makes explicit the currently implicit references in the Electronic Rule Filing Act to Department of Aging review of certain rules.

- Repeals a procedure for legislative review of adopted rules that has been made obsolete by the electronic rule filing system.

CONTENT AND OPERATION

Generally, the bill modifies rule-making procedure and the procedure by which rules are legislatively reviewed.[1]

Agencies to give new notice of and conduct new hearing on certain revised proposed rules

Agencies that adopt rules under the Administrative Procedure Act (R.C. Chapter 119.) are required to give public notice of, and to conduct a public hearing on, the original version of their proposed rules (R.C. 119.03(A) and (C)(1)(a) and (2)). As these duties have been interpreted by the courts, an agency is required to give a new public notice of, and to conduct a new public hearing on, a revised version of a proposed rule only if the revisions change the proposed rule to such a degree that it would be unrecognizable from the notice. *Jamison Plumbing &*

[1] *In this analysis, "rule" includes the enactment ("adoption") of a new rule and the amendment or rescission of an existing rule.*

Heating Co. v. Rose (1967), 14 Ohio App.2d 47; *Ohio State Federation of Licensed Nursing Homes v. Public Health Council* (1961), 113 Ohio App. 113.[2]

The bill displaces this interpretation to some degree. It requires an agency to give a new public notice of, and to conduct a new public hearing on, a proposed rule if the agency substantively revises the *original* version of the proposed rule after it is published in the *Register of Ohio* (R.C. 119.03(C)(1)(b)).[3] Specifically, the agency is required to give a new public notice with regard to the substantively revised original version for at least ten days before the new public hearing. The new public hearing is to be conducted in the same manner as public hearings are conducted on original versions of proposed rules under continuing law. (R.C. 119.03(C)(1)(b).)

If an agency has already scheduled a public hearing on the original version of the proposed rule, it is not required to conduct a new public hearing if (1) the public notice given for the already scheduled public hearing is sufficient to comprehend the original version as substantively revised or (2) a supplementary public notice can be given for at least ten days before the already scheduled public hearing. If the agency cannot avail itself of this exception, it is required either to refile the proposed rule in such a manner that the time for its legislative review and invalidation is extended or to notify the Joint Committee on Agency Rule Review (JCARR) in writing of its intention to make such a refiling. The bill specifies that an agency can make such a refiling even if the revised proposed rule that is being refiled is the same as the revised proposed rule that was previously filed. (R.C. 119.03(C)(1)(b).)

The new notice and hearing duties will apply with regard to a proposed rule, the original version of which is filed with JCARR on or after the bill's effective date (Section 4 of the bill).

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[2] *The notice of proposed rule-making includes a synopsis of the proposed rule. According to* Jamison*, a new hearing is required under current law if (a) revisions in a rule as adopted cause the rule as adopted to "differ" from the synopsis of the rule as proposed and (b) the revisions are not "sufficiently consistent" with the synopsis as to "insure that all persons affected [by the adopted rule] have been afforded a reasonable opportunity to present their views of the substance and effect of . . . [the rule as proposed] at the public hearing conducted therefor."*

[3] *Publication of the original version of a proposed rule in the* Register of Ohio *is legally sufficient to give public notice of the proposed rule, and until that publication has been made, the proposed rule "is not valid against a person who does not have actual knowledge of" the proposed rule. See R.C. 119.037--not in the bill.*

JCARR to consider whether regulatory burden of proposed rule outweighs its regulatory benefit

Continuing law requires JCARR to review, among other things, whether a proposed rule conflicts with the legislative intent of the statute under which the agency proposed the rule. The bill adds a requirement that, in reviewing a proposed rule for consistency with legislative intent, JCARR is to take into account, among other matters relevant to its review, the intent of the General Assembly that the regulatory burden of the proposed rule should not outweigh its regulatory benefit. (R.C. 119.03(I)(1).)

Revision of procedure for return of proposed rule having an incomplete or inaccurate RSFA

The bill extensively revises the phase of the Legislative Review of Rules Act under which JCARR, instead of recommending invalidation of a proposed rule because its rule summary and fiscal analysis (RSFA) is incomplete or inaccurate, can return the proposed rule to the agency and order the agency to complete or correct the RSFA and refile it together with the proposed rule (R.C. 119.03(I)(4)). The revision of this alternative procedure has two components.

Currently, the alternative procedure is available only with regard to a proposed rule that has a fiscal effect on school districts, counties, townships, or municipal corporations. One component of the revision removes this limitation and thus makes the alternative procedure available with regard to all proposed rules that are subject to legislative review. (R.C. 119.031(I)(4).)

Under the second component of the revision, instead of recommending invalidation of a proposed rule because its RSFA is incomplete or inaccurate, JCARR is authorized, by vote of a majority of its members (six), to postpone further consideration of the proposed rule. During the postponement, the time within which legislative review and invalidation of the proposed rule must be completed does not run, and the agency is prohibited from adopting the proposed rule. Instead, the agency is authorized to revise the proposed rule and the RSFA and to refile them with JCARR. (R.C. 119.03(I)(4).)

JCARR is required to file notice of the postponement with the agency, the Secretary of State, and the Director of the Legislative Service Commission. The Director, in turn, is required to publish the notice in the *Register of Ohio*. (R.C. 119.03(I)(4).)

The postponement ends when the agency files the proposed rule and RSFA with JCARR or when 60 days have elapsed, whichever occurs first. On the day after the day the postponement ends, JCARR's consideration of the proposed rule

automatically resumes, and JCARR then is to consider the proposed rule either in the form it had when the postponement began or as it has been revised during the postponement. In either case, however, the proposed rule is to be treated upon resumption of consideration as if it were the original version of the proposed rule and were being filed with JCARR for the first time. This gives a full, 65-day period for legislative review, not the 30-day period for legislative review that usually applies to revised proposed rules. (R.C. 119.03(I)(4).)

If the agency revised the RSFA during the postponement, JCARR is required to review the revised RSFA for completeness and accuracy under its regular review procedure. If, however, the agency has not revised the RSFA during the postponement, JCARR is authorized to recommend invalidation of the proposed rule. If JCARR exercises this authority, it would effectively foreclose further review of the proposed rule under the regular review procedure. (R.C. 119.03(I)(4).)

JCARR is prohibited from postponing more than once further consideration of a proposed rule because its RSFA is incomplete or inaccurate (R.C. 119.03(I)(4)). If after a postponement, a revised RSFA persists in being incomplete or inaccurate, JCARR would be authorized only to recommend invalidation of the proposed rule.

RSFAs to identify other rules also affecting subject of proposed rule

Continuing law requires an agency to provide, as part of the RSFA for a proposed rule, a brief summary of, and the legal basis for, the proposed rule. The description of the proposed rule's legal basis includes citations identifying the statute prescribing the rule-making procedure under which the agency is proposing the rule, the statute that authorizes the agency to propose the rule, and the statute the agency intends to amplify or implement by adopting the proposed rule. The bill adds a requirement that the description of legal basis also include citations to all other rules, whether adopted by the agency or by any other agency, that also affect the subject affected by the proposed rule. (R.C. 127.18(B)(3).) In legal parlance, this new requirement reflects the *in pari materia* (Latin: "in the same matter") doctrine, which requires rules relating to the same subject to be considered together in interpreting them.

RSFAs to include analysis of impact on Ohio businesses

An agency's RSFA for a proposed rule currently is required to estimate the cost that all persons who will be directly affected by the rule will incur in complying with the rule. The bill adds that, if a proposed rule is reasonably likely to have a significant economic impact on Ohio businesses, the RSFA also is to include an analysis of that impact. (R.C. 127.18(B)(6).)

The analysis is to include (R.C. 127.18(B)(6)):

- A description, with reasonable particularity, of the Ohio businesses it reasonably appears the proposed rule is likely to have a significant impact upon;

- A determination of significant increases or decreases the proposed rule may cause in the overall regulatory burden borne by those Ohio businesses;

- An estimate of significant increases or decreases the proposed rule may cause in the cost to those Ohio businesses of regulatory compliance;

- A determination of the effect the proposed rule may have on the time required for the rule-making agency's issuance of a license, permit, or other form of authorization that pertains to those Ohio businesses;

- An explanation balancing, with reasonable particularity, the regulatory burden the proposed rule is likely to have on those Ohio businesses and the regulatory benefit the proposed rule is likely to supply;

- If the balancing reveals that the regulatory burden outweighs the regulatory benefit, an explanation of why the balance does not violate the legislative policy that the regulatory burden of a proposed rule should not outweigh its regulatory benefit (see above); and

- Any other information the agency considers necessary fully to explain the significant economic impact the proposed rule is reasonably likely to have on those Ohio businesses.

The bill defines an "Ohio business" as a sole proprietorship or business organization that is doing business in Ohio, regardless of whether it is domiciled in Ohio (R.C. 127.18(A)(1)).

The balancing of regulatory benefit and regulatory burden in the RSFA anticipates JCARR's duty to take that balancing into account in reviewing whether the proposed rule described in the RSFA is consistent with the legislative intent embedded in the statute under which it is being proposed.

This new analytical requirement will apply only with regard to a proposed rule, the original version of which is filed with JCARR on or after the bill's effective date (Section 4 of the bill).

Agencies required to consider whether proposed rules are subject to small business or Department of Aging review

Under continuing law, a proposed rule is subject to small business review coordinated by the Office of Small Business in the Department of Development if it affects small businesses or small organizations (R.C. 121.24--not in the bill) and to review by the Department of Aging if it primarily affects individuals who are 60 years of age or older (R.C. 173.01(C)--not in the bill). The bill requires an agency to consider applicability of these special review procedures whenever the agency files a proposed rule, and to submit the proposed rule to either or both procedures if they apply. (R.C. 111.15(E)(2) and (3) and 119.03(B).)

References to Department of Aging review in Electronic Rule Filing Act made explicit

The Electronic Rule Filing Act, which establishes the electronic rule filing system by which rules are transmitted, currently includes Department of Aging review only by implication, by virtue of its general standard that the electronic rule filing system is to be a complete electronic rule-filing system (R.C. 103.0511(E)). The bill makes the implicit references to Department of Aging review explicit (R.C. 103.0511(C)).

Repeal of obsolete procedure for legislative review of adopted rules

The Legislative Review of Rules Act includes a procedure by which a rule that has been adopted by an agency is legislatively reviewed if the rule is found to contain a substantive change that was made between the time the rule was last filed with JCARR and the time the rule was adopted and filed in final form. (R.C. 119.031--not in the bill.) The electronic rule filing system operates in such a manner, however, that an agency cannot change a rule after it has last been filed with JCARR. The procedure for legislative review of adopted rules therefore is obsolete, and it is repealed by the bill. (Section 3 of the bill.)

HISTORY

ACTION	DATE
Introduced	11-16-06
Reported, H. State Gov't	---

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