



Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 396*

129th General Assembly

(As Reported by S. State and Local Government and Veterans Affairs)

Reps. McGregor and Murray, Anielski, Beck, Blair, Blessing, Buchy, Carney, Celebrezze, Clyde, Combs, Duffey, Goyal, Hackett, C. Hagan, Hayes, Hottinger, Kozlowski, Letson, McClain, Newbold, O'Brien, Ruhl, Sears, Sprague, Thompson, Winburn, Young, Yuko, Batchelder

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BILL SUMMARY

- Revises rule-making and rule review procedures.

No change rules to be put through business review

- Requires existing rules that, as a result of their review under the Periodic Review of Rules Act, are being filed as "no change" rules, to be put through business review.

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

Under current law recently enacted by the Common Sense Initiative Act,¹ beginning on January 1, 2012, proposed rules that are being drafted are put through business review before they begin the formal rule-making process. Business review is carried out by an agency in the Governor's Office, the Common Sense Initiative Office (CSIO). Under the bill, existing rules that, as a result of periodic review under the Periodic Review of Rules Act, are being filed as "no change rules" are subject to business review, just as draft rules currently are subject.

Under the Periodic Review of Rules Act, an agency is required, approximately every five years, to review its existing rules against several enumerated standards. One of the standards is whether an existing rule has an adverse impact on businesses, and whether any such adverse impact has been eliminated or reduced as required by the Common Sense Initiative Act. If the agency concludes that an existing rule has such an adverse impact on businesses, the bill requires the agency to amend or rescind the existing rule to reduce or eliminate the adverse impact in accordance with its review of the existing rule. If, however, the agency concludes that the existing rule does not have such an adverse impact on businesses, the bill requires the agency to file the rule without change for review under the Periodic Review of Rules Act. Such a rule is referred to as a "no change rule."

The bill makes no change rules subject to business review. An agency that files a no change rule must comply with the following procedural steps:

(1) The agency first must reconsider the no change rule against only the standard explained above pertaining to whether it has an adverse impact on businesses.

(2) If the no change rule does not have an adverse impact on businesses, the agency can proceed with filing the no change rule for legislative review.

(3) If, however, the no change rule has an adverse impact on businesses that has not been eliminated or reduced, the agency must prepare a business impact analysis that describes its review of the no change rule against the standard explained in (1) above and that explains why the no change rule is not being amended or rescinded to reduce or eliminate its adverse impact on businesses.

(4) The agency must transmit a copy of the full text of the no change rule and the business impact analysis electronically to CSIO. CSIO must make the no change rule and analysis available to the public on its web site.

¹ S.B. 2 of the 129th General Assembly.

(5) CSIO must evaluate the no change rule and business impact analysis against the Business Impact Analysis Instrument and any other relevant criteria, and is authorized, but not required, to prepare and transmit recommendations to the agency on how the no change rule might be amended or rescinded to eliminate or reduce any adverse impact the no change rule has on businesses.²

Note: The Business Impact Analysis Instrument is a document prepared by CSIO. The instrument functions as a tool for evaluating rules to determine whether the rules have an adverse impact on businesses.³

(6) The agency must consider any recommendations made by CSIO.

(7) Not earlier than the 16th business day after transmitting the no change rule and business impact analysis to CSIO, the agency must either (a) proceed to file the no change rule with the Joint Committee on Agency Rule Review (JCARR) for review under the Periodic Review of Rules Act as a no change rule, or (b) commence the process of rescinding the no change rule or of amending the no change rule to incorporate into the rule features CSIO's recommendations suggest will eliminate or reduce the adverse impact the rule has on businesses.

(8) If the agency receives recommendations from CSIO, and determines not to amend or rescind the no change rule, the agency must prepare a memorandum of response that explains why the no change rule is not being rescinded or why the recommendations are not being incorporated into the rule.

JCARR does not have jurisdiction to review, and must reject, the filing of a no change rule if, at any time while the no change rule is in its possession, it discovers that the no change rule has an adverse impact on businesses and the agency has not complied with the procedure outlined above.⁴ When the filing of a no change rule is rejected, it is as if the filing had not been made. JCARR must electronically return a rule that is rejected to the agency, together with any documents that were part of the filing. The rejection does not preclude the agency from refileing the rule with JCARR after complying with the procedure outlined above. This power to reject the filing of a no change rule is in addition to JCARR's continuing power to recommend invalidation of a no change rule if the rule has not been properly reviewed and amended or rescinded

² R.C. 107.54(A)(2).

³ See R.C. 107.52 (definition of when a rule has an "adverse impact on businesses") and 107.53 (Business Impact Analysis Instrument). Both of these sections are in the bill.

⁴ R.C. 106.031(C)(2).

when reviewed against the standards for periodic review, including the standard pertaining to reducing or eliminating adverse impacts on businesses.

When the joint committee recommends that a rule be invalidated, the recommendation does not suspend operation of the rule, and the rule remains operational pending action by the Senate and House of Representatives on the concurrent resolution embodying the recommendation. If the Senate and House of Representatives adopt the concurrent resolution, the rule is invalid. If, however, the Senate and House of Representatives do not adopt the resolution, the rule continues in effect, and is next to be reviewed according to the new periodic review date the agency has assigned to the rule in the course of the Periodic Review of Rules Act process.

JCARR referral or re-referral of proposed or existing rule to CSIO

- Authorizes JCARR to refer or re-refer a proposed or existing rule to CSIO if JCARR is uncertain whether the rule has an adverse impact on businesses or if it appears that such an impact has not been addressed or has been inadequately addressed.⁵

If JCARR is reviewing a proposed or existing rule under the Periodic Review of Rules Act and is uncertain whether the rule has an adverse impact on businesses, or if the rule appears to have an adverse impact on businesses that has not been addressed or that has been inadequately addressed, JCARR electronically may refer or re-refer the rule to the CSIO. JCARR also may transmit a memorandum to CSIO along with the proposed or existing rule explaining specifically why it is referring or re-referring the rule to CSIO. The joint committee electronically must notify the agency if it refers or re-refers the proposed or existing rule to CSIO.

Such a referral or re-referral tolls (stops) the running of the time within which the joint committee is required to recommend adoption of a concurrent resolution invalidating the proposed or existing rule. The time resumes running when the proposed or existing rule is returned to the joint committee after the referral or re-referral. The tolling does not affect the continued operation of an existing rule.

CSIO, within 30 days after receiving a proposed or existing rule from JCARR as explained above, must evaluate or re-evaluate the rule to determine whether it has an adverse impact on businesses, and then must proceed as explained below, as is appropriate to its determination.

⁵ R.C. 106.05.

If CSIO determined that the proposed or existing rule does not have an adverse impact on businesses, CSIO must prepare a memorandum stating that finding. CSIO electronically must transmit the memorandum to the agency, and must return the proposed or existing rule to the joint committee. CSIO also must transmit a copy of its memorandum to JCARR along with the proposed or existing rule. JCARR may review or reject the proposed or existing rule, the same as if the rule had not been referred or re-referred to CSIO. If, when the proposed or existing rule is returned to JCARR, fewer than 30 days remain in the time by which a concurrent resolution invalidating the rule must be recommended, the time for making such a recommendation is extended until the thirtieth day after the day on which the rule was returned to JCARR.

If, however, CSIO determined that the proposed or existing rule has an adverse impact on businesses, CSIO electronically must transmit the memorandum to the agency, and must also return the proposed or existing rule to the agency. CSIO also must transmit a copy of its memorandum to JCARR along with the proposed or existing rule. After receiving the memorandum and proposed or existing rule from CSIO, the agency must evaluate the impact of the proposed or existing rule on business, complete a business impact analysis, and submit the business impact analysis to CSIO for review.

When CSIO transmits a copy of a proposed rule to JCARR, if fewer than 30 days remain in the time by which a concurrent resolution invalidating the rule must be recommended, the time for making such a recommendation is extended until the thirtieth day after a copy of the rule was transmitted to JCARR. The agency, after considering the CSIO's recommendations, may revise the proposed rule. And, if the agency does so, the agency may either incorporate into the revised proposed rule features the recommendations suggest will reduce or eliminate any adverse impact the proposed rule might have on businesses or document in writing reasons why the recommendations are not being incorporated into the revised proposed rule. The agency then must prepare a memorandum of response identifying features suggested by any recommendations that were incorporated into the proposed rule, explaining how those features reduce or eliminate any adverse impact the revised proposed rule might have on businesses, and explaining why features suggested by the recommendations that were not incorporated into the revised proposed rule were not incorporated.

When, on the other hand, CSIO transmits a copy of an existing rule to JCARR, it is the same as if the agency had withdrawn the rule from JCARR's jurisdiction. If the agency determines, after considering CSIO's recommendations, that the existing rule needs to be amended or rescinded, the agency is to commence the process of doing so. If, however, the agency determines, after considering the CSIO's recommendations, that the no change rule does not need to be amended or rescinded, the agency must resume

periodic review of the no change rule by preparing a memorandum of response explaining why the no change rule is not being rescinded or why CSIO's recommendations are not being amended into the no change rule. The memorandum and no change rule must be filed with JCARR.

Abbreviated compliance with business review by elected state officers

- Specifies that rule-making by the offices of the state elected officers must comply with the business review provisions, but may bypass CSIO and file relevant business review documents directly with JCARR.
- Specifies that these rules may become subject to review by CSIO under the referral and re-referral provisions of the bill (described above).

The offices of the Governor, Lieutenant Governor, Auditor of State, Secretary of State, Treasurer of State, and Attorney General are required to comply with the business review provisions of existing law (proposed rules) and the bill (existing, no change rules), but are not required to submit any document to CSIO or to prepare any document that would have been prepared in response to recommendations of CSIO, but rather are to prepare all other documents required under the business review provisions and submit the documents directly to JCARR along with the proposed or existing rule.⁶ These rules may become subject to review by CSIO, however, under the referral or re-referral provision described above.

Applicability of Common Sense Initiative Act clarified

- Amends the Common Sense Initiative Act to clarify its applicability under the bill to existing, no change rules.

The Common Sense Initiative Act currently refers specifically to "draft rules."⁷ This usage emphasizes the original intent of the act to put rules that are being drafted through business review before they begin the formal rule-making process. The bill adds references to "existing rules."⁸ This clarifies that the bill is expanding the Common Sense Initiative Act to make it apply expressly also to existing, no change rules, which the bill subjects to business review according to the procedure described above.

⁶ R.C. 106.051 and 121.81(A).

⁷ R.C. 121.81(B).

⁸ R.C. 107.52, 107.53, 107.54, 107.55, 107.62, and 107.63.

Legislative invalidation of proposed and existing rules: procedure clarified

- Clarifies the procedure according to which concurrent resolutions invalidating proposed and existing rules are processed.

Under the Legislative Review of Rules Act and the Periodic Review of Rules Act, the Joint Committee on Agency Rule Review (JCARR) is authorized to recommend that the General Assembly adopt a concurrent resolution invalidating proposed rules or existing no change rules (see below) that were reviewed under those laws.⁹ The bill clarifies the procedure for processing these concurrent resolutions.¹⁰

To recommend adoption of such a concurrent resolution, the Chairperson of JCARR, or another member of JCARR designated by the Chairperson, must prepare the recommendation of invalidation in writing. The recommendation must identify the proposed or existing rule, the agency that proposed or submitted the proposed or existing rule, and the finding that caused the joint committee to make the recommendation. The recommendation also must briefly explain the finding.

The Chairperson of JCARR must request the Legislative Service Commission to prepare a concurrent resolution to invalidate the proposed or existing rule according to the recommendation. The concurrent resolution must state the finding that caused JCARR to recommend invalidation of the rule.

The Chairperson of JCARR, or another member of JCARR designated by the Chairperson, must submit the concurrent resolution to the clerk of either house of the General Assembly. The recommendation of invalidation and a copy of the proposed or existing rule also must be submitted to the clerk along with the concurrent resolution.

The failure of the General Assembly to enact a concurrent resolution invalidating a proposed or existing rule is not a ratification of the lawfulness or reasonableness of the proposed or existing rule or a ratification of the validity of the procedure by which the rule was proposed or adopted.

⁹ R.C. 119.03(I) and 119.032.

¹⁰ R.C. 101.35, 106.01, 106.02, 106.021, 106.022, 106.023, 106.03, 106.031, 106.032, 106.04, 106.041, 106.042, 111.15, 119.01, and 119.03.

Suspension of proposed rules upon recommended invalidation

- Declares that the rule-making proceedings pertaining to a proposed rule are suspended if the Joint Committee on Agency Rule Review (JCARR) recommends adoption of a concurrent resolution to invalidate the proposed rule.¹¹

The bill specifies that such a suspension begins when JCARR votes to recommend invalidation of the proposed rule and ends on the earlier of (1) the day that is six months after the day the vote was taken or (2) the day both houses have adjourned sine die. The bill also declares that rule-making proceedings may resume upon the ending of the suspension, unless a concurrent resolution invalidating the proposed rule is adopted during the suspension, in which case the proposed or existing rule is invalid as provided in the concurrent resolution.

Legislative review December carry-over clause modified

- Specifies that a *revised* version of a proposed rule that is filed with JCARR in December is to be reviewed legislatively not later than the 30th day after the first day of the legislative session in the following January.¹²

Under the Legislative Review of Rules Act, when the original or a revised version of a proposed rule is filed with JCARR in December, the proposed rule is carried over for review in the following January and then reviewed as if it were the original version of the proposed rule and had been filed on the first day of the legislative session in that January. The effect is to allow 65 days for legislative review of proposed rule that has been carried over, regardless of the pre-carry-over status of the proposed rule as original or revised. The bill rather distinguishes original and revised versions of proposed rules for purposes of the carry-over clause. Under the bill, if the *original* version of a proposed rule is filed with JCARR in December, it will continue to be reviewed legislatively as specified in current law. If, however, a *revised* version of a proposed rule is filed with JCARR in December, it will be reviewed legislatively not later than the 30th day after the first day of the legislative session in the following January.

¹¹ R.C. 106.023.

¹² R.C. 106.02 (2nd paragraph).

Legislative review mandatory

- Clarifies that a proposed rule that is subject to legislative review cannot be adopted until the time for legislative review has expired without recommendation of a concurrent resolution to invalidate the proposed rule.¹³

The bill clarifies that a proposed rule that is subject to legislative review cannot be adopted and filed in final form unless the proposed rule has been filed with JCARR and the time for JCARR to review the proposed rule has expired without recommendation of a concurrent resolution to invalidate the proposed rule.

Extension or revival of review time for proposed rule if later version rejected

- Extends or revives the time for legislative review of a proposed rule if JCARR rejected a later version of the proposed rule for noncompliance with business review procedures.

Under the Common Sense Initiative Act, JCARR can reject a proposed rule (just as it can a no change rule) if the rule is discovered to have adverse impact on businesses and the agency has not complied with the business review procedure.¹⁴ The bill revives or extends the time for legislative review of a proposed rule when the last previously filed version of a proposed rule, the filing of a later version of which has been rejected by JCARR, remains in JCARR's possession, and the time for legislative review of that previously filed version has expired, or fewer than 30 days remain before the time for legislative review of that previously filed version expires. In such a case, recommendation of a concurrent resolution to invalidate that previously filed version may be adopted not later than the 65th day after the day on which the filing of the later version was rejected. This deadline can be extended under the legislative review December carry-over clause (see above) that applies to proposed rules filed in December and that restarts their legislative review in the following January.

Operational duration of emergency rules increased

- Increases the period of time during which an emergency rule remains operative from 90 to 120 days.¹⁵

¹³ R.C. 106.023, 111.15(D), and 119.03(E).

¹⁴ R.C. 121.83(B)(1).

¹⁵ R.C. 111.15(B)(2) and 119.03(G).

Under both the Administrative Procedure Act and the abbreviated rule-making procedure,¹⁶ an emergency rule remains in operational effect for 90 days. The bill increases this period of time to 120 days. The 120-day period of time allows time for an agency to adopt a rule under the regular, nonemergency rule-making procedure.

Procedural changes for adopting auditing rules

- Eliminates the special exception that authorized the Auditor of State not to prepare a rule summary and fiscal analysis of proposed auditing rules, and thereby brings the procedure for adopting auditing rules into conformity with general rule-making procedures.
- Authorizes the Auditor of State to send notices of the public hearing on proposed auditing rules and to transmit copies of proposed auditing rules by electronic mail.

Transition rules

- Specifies that rules pending before JCARR on the effective date of the bill are not subject to its revised and clarified legislative review procedures.¹⁷

The bill specifies that its revised and clarified legislative review procedures do not apply to rules that are pending before JCARR on its effective date. The old law will continue to apply to these rules. The revised and clarified legislative review procedures of the bill therefore will apply to rules that are filed with JCARR on or after the effective date of the bill.

Transitional duties of Legislative Information Systems

- Requires Legislative Information Systems to program or reprogram the electronic rule filing system as necessary to enable electronic filing and other processing of rules as is required by the bill within six months after its effective date.¹⁸

¹⁶ R.C. 111.15 (abbreviated rule-making procedure) and 119.03(G) (Administrative Procedure Act). (Both of these sections are in the bill.) The difference between the abbreviated rule-making procedure and the rule-making procedure of the Administrative Procedure Act is explained below in a note under "Recodification and correction of legislative review acts."

¹⁷ Section 7 of the bill.

¹⁸ Section 6 of the bill.

The bill requires Legislative Information Systems, in consultation with the Director of the Legislative Service Commission, the Executive Director of JCARR, CSIO, and any other person or agency involved in the electronic rule filing system, to program or reprogram the electronic rule filing system as necessary to enable electronic filing and other electronic processing of rules and rule-making documents as is required by the bill. Legislative Information Systems is to complete the programming or reprogramming as soon as reasonably possible after the effective date of the bill but not later than the day that is six months after that effective date. If, at the time a provision of the bill that contemplates electronic filing or other electronic processing of rules and rule-making documents takes effect, electronic filing or other electronic processing is not available, the provision is to be complied with manually until electronic filing or other processing is available.

Note: The electronic rule filing system is an electronic system that enables rules and rule-making and rule-related documents to be filed, and official responses to these filings to be made, exclusively by electronic means. The electronic rule filing system is operated and maintained by Legislative Information Systems.

Recodification and correction of legislative review acts

- Relocates and otherwise reorganizes the Legislative Review of Rules Act and the Periodic Review of Rules Act to cure their inaccurate locations in the Revised Code.

The Legislative Review of Rules Act and the Periodic Review of Rules Act are inaccurately located as part of the Administrative Procedure Act (APA).¹⁹ This location is inaccurate because the two acts apply also to rules that are subject to the so-called abbreviated rule-making procedure.²⁰ But rules subject to the abbreviated rule-making procedure are not subject to the APA, and vice versa.

Note: When an agency's rule-making is subject to the Administrative Procedure Act, the agency is required, among other things, to give notice of its intention to adopt a rule, to hold a public hearing on the proposed rule, and to make an effort to inform persons subject to the rule of its adoption. When, however, an agency's rule-making is

¹⁹ R.C. Chapter 119.

²⁰ R.C. 111.15.

subject to the abbreviated rule-making procedure, the agency is not required to do any of these things, which is why the procedure is referred to as being abbreviated.²¹

The bill relocates several provisions to cure their currently inaccurate locations.²² The following tables outline the relocations.

In the first table, the left-hand column indicates the topic of the law that is being relocated, the middle column indicates the current location of the law, and the right-hand column indicates the proposed new location of the current law.

Topic	Current Location	Proposed New Location
Procedure for legislative review of proposed rules	R.C. 119.01 and 119.03(I)	R.C. 106.02, 106.021, and 106.022
Filing proposed rules that are being adopted under the Administrative Procedure Act for legislative review	R.C. 119.03(H)	R.C. 119.03(C)
Procedure for periodic review, at five-year intervals, of existing rules	R.C. 119.032	R.C. 106.03 and 106.031

The following table presents the same information as the previous table, but the middle column indicates the new location of the law that is proposed to be relocated from the location indicated in the right-hand column.

Topic	Proposed New Location	Current Location
Procedure for legislative review of proposed rules	R.C. 106.02, 106.021, and 106.022	R.C. 119.01 and 119.03(I)
Filing proposed rules that are being adopted under the Administrative Procedure Act for legislative review	R.C. 119.03(C)	R.C. 119.03(H)
Procedure for periodic review, at five-year intervals, of existing rules	R.C. 106.03 and 106.031	R.C. 119.032

²¹ Compare R.C. 119.03(A), (D), and (E) with R.C. 111.15(B). Both of these sections are in the bill.

²² Section 4 of the bill.

Except as explained in this analysis, current law that is relocated is continued at the new location with only stylistic improvement.

- Adjusts cross-references to make them reflect the relocated provisions they are referring to.²³
- Requires a rule summary and fiscal analysis of a proposed rule to include the electronic mail address of an individual or office within the agency that is responsible for coordinating and making available information about the proposed rule.²⁴

Note: A rule summary and fiscal analysis (RSFA) is a form that is completed in the course of preparing a proposed rule. The RSFA is filed along with the proposed rule, and assists the public and JCARR in reviewing the proposed rule.

- Repeals obsolete provisions,²⁵ repeals surplus provisions,²⁶ and cures other technical defects²⁷ in rule-making and rule review procedures.

References to "119.032 review dates"

- Specifies that references to the "119.032 review date" of a rule are to be read as if they referred to the sections providing for periodic review under the bill.²⁸

The date by which the periodic review of an existing rule is to be completed has been referred to as its "119.032 review date." That number is the number of the Revised Code section under which periodic review of existing rules was carried out before the section was relocated by the bill (see above). Because of that relocation, periodic review of existing rules will be carried out, not under R.C. 119.032, but under R.C. 106.03 and 106.031. The bill therefore specifies that a reference to the "119.032 review date" of an

²³ R.C. 101.35, 103.0511, 111.15, 119.03, 119.04, 121.39, 121.73, 121.81, 121.82, 127.18, 1531.08, 3319.22, 3319.221, 3333.021, 3333.048, 3737.88, 3746.04, 4117.02, 5103.0325, 5117.02, 6111.31, and 6111.51.

²⁴ R.C. 127.18.

²⁵ R.C. 111.15, 119.01, 119.031, 119.04, 4141.14, and 5703.14.

²⁶ R.C. 121.74, 4141.14, and 5703.14.

²⁷ R.C. 103.0511 and 111.15.

²⁸ Section 5 of the bill.

existing rule is to be read as if it referred to periodic review of the rule under R.C. 106.03 and 106.031.

The bill recommends that the date by which the periodic review of an existing rule is to be completed be referred to as its "periodic review date."

HISTORY

ACTION	DATE
Introduced	12-13-11
Reported, H. State Gov't & Elections	03-28-12
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Reported, S. State & Local Gov't & Veterans Affairs	---

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