

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bills 877, 878, and 879 (as enrolled)
Sponsor: Senator Bev Hammerstrom (Senate Bill 877)
Senator Walter H. North (Senate Bill 878)
Senator Glenn D. Steil (Senate Bill 879)
Senate Committee: Government Operations
House Committee: Family and Civil Law

PUBLIC ACTS 262-264 of 1999

Date Completed: 1-25-00

CONTENT

Senate Bill 877 amends the Administrative Procedures Act (APA) to do the following:

- Provide that the Office of Regulatory Reform (ORR) is a Type 1 agency within the Department of Management and Budget (DMB).
- Authorize the ORR to prescribe procedures and standards for processing administrative rules.
- Revise the role of the Joint Committee on Administrative Rules (JCAR) and the Legislature in the process of approving or disapproving rules.
- Establish procedures for the adoption of a standard form contract.
- Require agencies to give notice of guidelines to the ORR and JCAR.
- Transfer to the ORR, from the Legislative Service Bureau (LSB), the responsibility to publish the *Michigan Register* and prepare annual supplements to the *Michigan Administrative Code*.

Senate Bill 878 amends Public Act 193 of 1970 (which provides for the compilation of the general laws of the State and the State administrative rules) to transfer from the Legislative Council to the ORR the responsibilities for providing compilations of administrative rules promulgated under the APA, providing for an orderly revision of the *Michigan Administrative Code*, and examining copies of the compilation before they are printed and bound and certifying their compliance with the Act.

Senate Bill 879 amends the Legislative Council Act to provide for the ORR, rather than the

Legislative Council or the LSB, to administer the *Michigan Register* Fund; determine the price for copies of the *Michigan Register*; and (beginning January 1, 2001) make the text of the *Michigan Register* available on the Internet. In addition, the Act requires the DMB to sell copies of the compiled statutes and the public and local acts at a price that does not exceed the actual cost of preparation, printing, and distribution. The bill also requires the DMB to sell electronic access to those publications at such a price.

(Please note: Executive Order 2000-1, which was issued after the bills were enacted, transferred the ORR back to the Executive Office.)

The bills, which were tie-barred to each other, will take effect April 1, 2000. A more detailed description of Senate Bill 877 follows.

Office of Regulatory Reform

The Office of Regulatory Reform originally was created in the Governor's office by Executive Order (E.O.) 1995-6. The bill provides that the ORR is an independent and autonomous Type 1 agency within the DMB, and has the powers and duties set forth in E.O. 1995-6. The bill also requires the ORR to review proposed rules, coordinate processing of rules by agencies, and consider efforts designed to improve public access to the rule-making process. The ORR must exercise these powers and perform these duties, including personnel, budgeting, procurement, and management-related functions, independently of the principal executive departments of this State.

Currently, the APA allows JCAR to prescribe procedures and standards for the drafting, processing, publication, and distribution of rules. The bill provides, instead, that the ORR may

prescribe procedures and standards for the drafting of rules, publication of required notices, and distribution of rules. In addition, the ORR may prescribe procedures and standards for the processing of rules within the executive branch.

(The APA defines “rule” as “an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency...”. “Agency” means a State department, bureau, division, section, board, commission, trustee, authority, or officer, created by the Constitution, statute, or agency action. The term does not include an agency in the legislative or judicial branch, the Governor, or other specific entities.)

Rule-Making Process

Request for Rule-Making. The bill provides that, before initiating any changes or additions to rules, an agency must file with the ORR a request for rule-making on a form prescribed by the ORR. (Executive Order 1995-6 requires agencies to file a request for rule-making before initiating the processing of any rule.) As E.O. 1995-6 requires, the request must include the following:

- The State or Federal statutory or regulatory basis for the rule.
- The problem the rule intends to address.
- An assessment of the significance of the problem.

Under the bill, an agency may not proceed with the processing of a rule unless the ORR has approved the request for rule-making.

The bill requires the ORR immediately to make copies of the request for rule-making available to JCAR. On a weekly basis, the ORR must provide JCAR with a listing of all requests approved or denied during the previous week. By the next business day after receiving this notice, JCAR must provide a copy of the approved and denied requests to JCAR members and to members of the standing committees of the Senate and House of Representatives that deal with the subject matter of a proposed rule.

Notification/Informal JCAR Review. The Act requires an agency to publish a notice of public hearing as prescribed in any applicable statute or the APA. The bill provides that an agency may publish the notice of public hearing only if the ORR has received draft proposed rules and given the agency approval to proceed with a public hearing. After granting approval to hold a public hearing, the ORR immediately must give a copy of the proposed rules to JCAR. By the next business day after receiving

this notice, JCAR must provide a copy of the proposed rules to its members and members of the Senate and House standing committees that deal with the subject matter of the proposed rules.

The Act also requires the agency to submit a copy of the notice of public hearing to the LSB for publication in the *Michigan Register*. Under the bill, the agency must submit a copy to the ORR for publication in the *Michigan Register* as well as file a copy of the notice with the ORR. Within seven days after receiving the notice, the ORR must forward a copy to JCAR and provide notice electronically through publicly accessible Internet media.

The bill requires JCAR, by the next business day after receiving the notice, to send copies to each of its members and to the members of the legislative committees that deal with the subject matter of the rules. After receiving the notice, JCAR may meet to consider the proposed rules, take testimony, and provide the agency with the Committee’s informal response to the rules.

Certification/Transmittal. The amendments described below apply to rules for which a public hearing has not been held by April 1, 2000.

Currently, the APA requires the LSB to approve a proposed rule if it considers the rule proper as to form, classification, and arrangement, and requires the Department of Attorney General to approve a proposed rule if it considers the rule to be legal. (Executive Order 1995-6 transferred this responsibility of the Attorney General to the ORR.) The bill provides that, if approved by the ORR, an agency may submit a proposed rule to the LSB for its certification. The LSB must approve a proposed rule if it considers the rule proper as to form, classification, and arrangement, and the ORR may approve a proposed rule if it considers the rule to be legal.

Under the APA, after a proposed rule is published in the *Michigan Register* and notice is given, and before the agency proposing the rule has formally adopted it, the agency must transmit by letter to JCAR copies of the rule, bearing certificates of approval from the LSB and the Attorney General, and copies of the rule without certificates. The bill provides, instead, that after notice is given and before the agency proposing the rule has formally adopted it, the agency must prepare an agency report containing a synopsis of the comments contained in the public hearing record, and describing any changes in the proposed rule that the agency made after the hearing. The ORR must transmit by letter to JCAR copies of the rule, the agency report, and certificates of approval from the LSB and ORR.

Under the Act, JCAR must receive the agency

transmittal within two years after the date of the last public hearing on the proposed rule. After JCAR receives the agency's letter of transmittal, JCAR has two months in which to consider the rule, although the Committee may vote to extend the time for consideration. The bill deletes these provisions. Under the bill, JCAR must receive the documents described above within one year after the date of the last public hearing.

Currently, the agency must include with the letter of transmittal a regulatory impact statement. If the regulatory impact statement discloses an impact on small businesses, the agency must include a small business economic impact statement. The bill retains the requirement that the agency include a regulatory impact statement with the letter of transmittal, and expands the information that the statement must contain. The bill deletes the requirement for a separate small business economic impact statement.

Under the bill, the agency must transmit the regulatory impact statement to the ORR at least 28 days before the public hearing. The ORR must approve the statement before the public hearing may be held. The agency also must send a copy of the statement to JCAR before the public hearing, and JCAR must make copies available to the public at the hearing.

Current Approval Process. Currently, if JCAR approves a proposed rule within the prescribed time period, it must attach a certificate of its approval to all copies of the rule bearing certificates except one, and transmit those copies to the agency. If JCAR disapproves the rule or reaches an impasse, the Committee must report that fact to the Legislature and return the rule to the agency. The agency may not adopt or promulgate the rule unless JCAR subsequently approves it, or the Legislature adopts a concurrent resolution approving the rule within 60 days after each house has received the Committee report.

If the time permitted expires and JCAR has not taken action, then JCAR must return the proposed rule to the agency. The chairperson and alternate chairperson must have concurrent resolutions approving the rule introduced in both houses of the Legislature, and each house must place the resolution directly on its calendar. The agency may not adopt or promulgate the rule unless the Legislature adopts a concurrent resolution approving the rule within 60 days after introduction, or the agency resubmits the rule to JCAR and the Committee approves it within the time allowed.

If JCAR approves a proposed rule within the time permitted, or the Legislature adopts a concurrent resolution approving the rule, the agency, if it wishes

to proceed, must formally adopt the rule pursuant to any applicable statute and make a written record of the adoption.

An agency may withdraw a proposed rule by leave of JCAR. An agency may resubmit a rule withdrawn or returned by JCAR with changes following a Committee meeting on the proposed rule or with minor modifications. A resubmitted rule is a new filing subject to the approval process, but is not subject to further notice and hearing.

The bill deletes all of these provisions.

New Approval Process. The following provisions apply to rules for which a public hearing has not been held by April 1, 2000.

After JCAR receives the letter of transmittal from the ORR, the Committee has 21 calendar days to consider the rule and to object to it by filing a notice of objection approved by a concurrent majority of JCAR members. The Committee may approve a notice of objection only if JCAR affirmatively determines that one of more of the following conditions exist:

- The agency lacks statutory authority for the rule.
- The agency is exceeding the statutory scope of its rule-making authority.
- There exists an emergency relating to the public health, safety, and welfare that would warrant disapproval of the rule.
- The rule is in conflict with State law.
- A substantial change in circumstances has occurred since the enactment of the law upon which the rule is based.
- The rule is arbitrary or capricious.
- The rule is unduly burdensome to the public or to a licensee licensed by the rule.

If JCAR does not file a notice of objection within 21 days, the ORR may file the rule immediately with the Secretary of State.

If JCAR does file a notice of objection, the Committee chair, the alternate chair, or any JCAR member must cause bills to be introduced in both houses of the Legislature. Each house must place the bill or bills directly on its calendar. The bills must do one or more of the following:

- Rescind the rule upon its effective date.
- Repeal the statutory provision under which the rule was authorized.
- Stay the rule's effective date for up to one year.

The notice of objection will stay the ORR's ability to file the rule with the Secretary of State for 21 consecutive calendar days, except as provided below:

- If both houses of the Legislature are not in session for more than 14 but not more than 21 consecutive calendar days after the notice of objection is filed, the 21-day time period must toll, and the remainder of the 21-day time period will be available for consideration upon the return of both houses. The combined time period for consideration by JCAR and the full Legislature may never exceed 63 consecutive calendar days under this provision.
- If both houses of the Legislature are not in session more than 21 consecutive calendar days after the notice of objection is filed, the 21-day time period must toll, with the remainder of the 21-day time period available

for consideration upon the return of both houses.

If the legislation is defeated in either house and the vote is not reconsidered, or if legislation is not adopted by both houses within the specified time period (the 21-day period, as tolled if appropriate), the ORR may file the rule with the Secretary of State.

If the legislation is enacted by the Legislature and presented to the Governor within the 21-day period, the rule will not become effective unless the Governor vetoes the legislation. If the Governor vetoes the legislation, the ORR may file the rule immediately.

An agency may withdraw and resubmit a proposed rule with or without permission of the chair and alternate chair. If permission to withdraw is granted, the 21-day time period is tolled until the rule is resubmitted, although JCAR must have at least seven calendar days after resubmission to consider the resubmitted rule. If permission is not granted, a new and untolled 21-day time period will begin upon resubmission of the rule to JCAR for consideration.

Promulgation. Currently, to promulgate a rule, an agency must file in the office of the Secretary of State three copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency may not file a rule, except an emergency rule, until at least 10 days after the date of the certificate of approval by JCAR or after the Legislature adopts a concurrent resolution approving the rule. An agency must send a copy of the rule bearing the required certificates of approval and adoption to the office of the Governor at least 10 days before it files the rule. The bill deletes these provisions.

Under the bill, to promulgate a rule, the ORR must file in the office of the Secretary of State three copies of the rule bearing the certificates of approval and adoption and true copies of the rule without the certificates. The ORR may not file a rule, except an emergency rule, until the time periods for JCAR and legislative consideration have elapsed.

Effective Date. Currently, except in the case of an emergency rule, a rule becomes effective on the date set in the rule, which may not be earlier than 15 days after the date of its promulgation. If a date is not set in the rule, it takes effect on the date of publication in the *Michigan Administrative Code* or a supplement to the Code. Under the bill, except in the case of an emergency rule, a rule becomes effective on the date set in the rule, which may not be earlier than seven days after the date of its promulgation. If a date is not set in the rule, it takes effect seven days after the date of promulgation.

Exempt Rules. The bill's provisions concerning objection by JCAR and consideration by the Legislature, and the requirement for a regulatory impact statement, do not apply to the following:

- Rules describing an agency's organization and operations.
- An amendment or rescission of a rule that is obsolete or superseded, or an amendment required to make obviously needed corrections.
- Emergency rules.

Emergency Rules. Under the APA, an agency may dispense with all or part of the notice and participation procedures if the agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following those procedures and states in the rule the agency's reason for that finding, and the Governor concurs in the finding of emergency. The bill retains the current emergency rule provisions, but deletes a provision under which the Legislature may rescind an emergency rule by concurrent resolution.

Standard Form Contract

Under the bill, before the adoption of a standard form contract that would have been considered a rule but for an exemption from rule-making under Section 7(o) or a policy exempt from rule-making under Section 7(p), an agency must give notice of the proposed standard form contract or policy to JCAR and the ORR. (Section 7(o) exempts the provisions of an agency's contract with a public or private entity, including the provisions of an agency's standard form contract. Section 7(p) exempts a policy developed by the Department of Community Health under authority granted in the Social Welfare Act to implement policies and procedures necessary to operate its health care programs in accordance with an approved State plan or in compliance with State statute.)

By the next business day after receiving the notice from the agency, JCAR must give a copy of the notice to its members and to members of the Senate and House standing committees that deal with the subject matter of the proposed standard form contract or policy.

The notice must include all of the following:

- A statement of the terms of substance of the proposed standard form contract or policy, a description of the subjects and issues involved, and the proposed effective date of the contract or policy.
- A statement that the addressee may express any views or arguments regarding the proposed contract or policy or its effect on a

person.

- The address to which comments may be sent and the date by which they must be mailed, which must be at least 35 days from the date the notice was mailed.
- A reference to the specific statutory provision under which the standard form contract or policy is issued.

If the value of a proposed standard form contract exempt from rule-making under Section 7(o) is \$10,000 or more, the notice must include a copy of the proposed contract. If the value is less than \$10,000, the department must provide a copy of the proposed contract or policy to any legislator requesting a copy.

Annual Regulatory Plan

The bill requires each agency to prepare an annual regulatory plan that reviews the agency's rules. In completing the plan, the agency must identify the rules it reasonably expects to process in the next year, the mandatory statutory rule authority it has not exercised, and the rules it expects to rescind in the next year. The bill specifies that the plans are regulatory only and do not bind the agency or in any way prevent additional action.

Annual regulatory plans must be filed with the ORR by July 1 of each year. After the ORR approves a plan for a review, the ORR must provide a copy of the plan of review to JCAR. By the next business day after receiving the plan of review, JCAR must provide a copy to its members and to members of the legislative standing committees that deal with the subject matter of rules the agency may propose.

Guidelines

Currently, before adopting a guideline, an agency must give notice of the proposed guideline to JCAR, the LSB, the office of the Governor, and each person who made a written request for advance notice of proposed action that may affect the person. Under the bill, an agency would have to give notice to JCAR, the ORR, and each person who made a request. By the next business day after receiving the notice from the agency, JCAR would have to give notice of the proposed guideline to its members and to members of the legislative standing committees that deal with the subject matter of the guideline.

The APA describes information that the notice must contain, including the address to which comments may be sent and the date by which they must be received. That date must be at least 60 days from the date the notice is mailed. Under the bill, the deadline for comments must be at least 35 days from the date of the mailing.'

(A guideline is an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person.)

Transfer of Responsibilities

The bill requires the ORR, rather than the LSB, to publish the *Michigan Register* (at least once a month); publish a cumulative index for the *Michigan Register*; publish a supplement to the *Michigan Administrative Code*; perform the editorial work for those publications; prepare reproduction proofs or negatives of the rules of an agency, upon request; and publish or order published a sufficient number of copies of those publications to meet the Act's requirements.

The Act requires the DMB to hold additional copies of the *Michigan Register*, the *Michigan Administrative Code*, and annual supplements for sale at a price not less than the publication and distribution costs. The bill specifies that any money collected by the DMB for the *Administrative Code* under this provision is to be deposited into the General Fund.

Currently, the *Michigan Administrative Code* and the annual supplements must be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs. Under the bill, the ORR must make the Code and, if applicable, the annual supplements available free of charge on the Internet and in printed or other electronic format for public subscription at a fee reasonably calculated to cover publication and distribution costs.

MCL 24.205 et al. (S.B. 877)
4.1201-4.1203 (S.B. 878)
8.41-8.48 (S.B. 879)

Legislative Analyst: S. Lowe

BACKGROUND

The Administrative Procedures Act was enacted in 1969. In addition to governing the promulgation of rules by State agencies, the APA provides for the adjudication of contested cases before agencies, and the judicial review of agency actions and decisions. Sections of the Act that involve legislative participation in the rule-making process have been the subject of litigation in recent years. The Michigan Court of Appeals found that the existing procedure was unconstitutional, and the Michigan Supreme Court has not decided an appeal of that holding.

This litigation involved administrative rules promulgated by the Michigan Department of Corrections (DOC) concerning visitation hours. After issuing a memorandum on the subject, the DOC began the process of promulgating the policy in

the form of administrative rules. When JCAR failed to approve the proposed rules, the Department promulgated the rules without a certificate of legislative or JCAR approval. The rules were challenged in a lawsuit and the trial court found that Section 45 of the APA was unconstitutional. (Section 45 contains the provisions under which a proposed rule cannot become effective unless it receives JCAR's approval or, if JCAR disapproves the rule or reaches an impasse, the Legislature approves the rule by concurrent resolution.)

On March 21, 1997, a panel of the Michigan Court of Appeals issued an opinion agreeing with the trial court (*Blank v Department of Corrections* and *Miller v Department of Corrections*, 222 Mich App 385). The Court of Appeals held that Section 45 of the APA violates the "enactment and presentment" clauses of Article IV of the State Constitution, which require all legislation to be by bill and require bills passed by the Legislature to be presented to the Governor. The Court also found that, by violating Article IV, Section 45 violates the doctrine of separation of powers. The Court struck down the unconstitutional sections of the APA but determined that those sections were severable from the Act.

As a result of this decision, approval of JCAR or the Legislature is not presently required for rules to be promulgated, although agencies still must give public notice and an opportunity to be heard, and the remainder of the APA is enforceable. (Also, as described above, Senate Bill 877 will reinstate revised approval requirements as of April 1, 2000.) The petitioners in *Blank v DOC* filed an application with the Michigan Supreme Court for leave to appeal. The Supreme Court granted the petitioners' leave to appeal, and heard oral arguments in the case, but has not rendered a decision.

FISCAL IMPACT

Senate Bill 877

The bill will have no net fiscal impact on State government and no fiscal impact on local units of government.

Senate Bill 878

The following revenue was generated from *Administrative Code* annual supplements: FY 1995-96: \$40,815; FY 1996-97: \$40,742; FY 1997-98: \$50,872.

Senate Bill 879

The following revenue was deposited in the *Michigan Register* Fund over three fiscal years: FY 1995-96: \$100,773; FY 1996-97: \$108,953; FY 1997-98: \$85,704.

Fiscal Analyst: B. Bowerman

S9900\sb877es

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.