

PROHIBIT STATE AGENCIES FROM ADOPTING RULES MORE STRINGENT THAN FEDERAL RULES

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House Bill 5613 (reported from committee w/o amendment)

Analysis available at
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Sponsor: Rep. Triston Cole

Committee: Regulatory Reform

Complete to 6-6-16

BRIEF SUMMARY: House Bill 5613 would amend Sections 32 and 45 of the Administrative Procedures Act of 1969 by prohibiting a state agency from adopting rules more stringent than the applicable federally-mandated standard unless the director of that agency determines there is a "clear and convincing need" to exceed the federal standard when the federal government has mandated that Michigan promulgate rules.

FISCAL IMPACT: House Bill 5613 would have an indeterminate fiscal impact on the state government, the magnitude and direction of which would depend on two unresolved questions: (1) the number of administrative rules that are more "stringent" than federal standards; and (2) The costs associated with enforcing the "stringent" provisions of these rules.

For those administrative rules for which there are federal standards, it is not altogether certain what the criteria for resolving question (1) would be; defining what constitutes a "stringent" rule could require additional legislative guidance and/or judicial interpretation. Resolving question (2) is dependent on the resolution of question (1), and would further entail financial analysis by the Office of Performance and Transformation to isolate the costs of enforcing the "stringent" provisions of administrative rules from the costs of enforcing the federal standard.

Over the long run, HB 5613 could decrease the state's expenditures by reducing the number and complexity of administrative rules and, therefore, the costs of enforcing those rules. However, the bill could alternatively increase state expenditures if particular rules, over and above federal standards, reduce the overall costs of enforcing the applicable federal standards (e.g. by clarifying federal standards and stipulating detailed requirements in attempt to reduce legal/compliance costs). Whether HB 5613 would result in an eventual decrease or increase in enforcement costs is currently uncertain.

THE APPARENT PROBLEM:

According to supporters of the bill, in order to better promote a business-friendly regulatory environment, the state should limit the degree to which its administrative rules vary from those established at the federal level. Proponents further assert that by limiting the ability of state departments and agencies to promulgate rules without first proving a "clear and convincing need," for the rule, or providing an explanation of how Michigan's unique characteristics warrant a more stringent rule, the legislative branch will provide a necessary check on the balance of executive policy-making. This policy-making ability should reside

with the legislature, say supporters, and the legislature can pass bills to enact the policy change a rule would have made if such a change is necessary.

THE CONTENT OF THE BILL:

House Bill 5613 would amend Sections 32 and 45 of the Administrative Procedures Act of 1969. Under the bill, if the federal government has not mandated that Michigan promulgate rules, then an agency could only promulgate more stringent rules if specifically authorized by statute to do so, or if the director of that agency determines there is a "clear and convincing need" to exceed the applicable federal standard.

If a proposed rule is more stringent than the applicable federal standard, regardless of whether the state was mandated to promulgate rules, the currently required regulatory impact statement must contain either the statute that specifically authorizes the more stringent rule or a statement of the specific facts that establishes the clear and convincing need to adopt the more stringent rule, and an explanation of the unique characteristics of this state that necessitate the more stringent standard.

HB 5613 also would update the statute so that provisions that now reference the Office of Regulatory Reinvention (ORR) would instead reference the Office of Performance and Transformation (OPT). This reflects changes made by Executive Order 2016-4, which created the OPT and moved the ORR and Office of Good Government (OGG) into the OPT. The OPT is housed in the Department of Treasury.

BACKGROUND INFORMATION:

Generally speaking, once a rule is adopted by the agency that proposed it, that agency must prepare a report that contains a notice of transmittal, the request for rule-making and the response from the Office of Regulatory Reinvention, a small business impact statement, and a regulatory impact statement. The regulatory impact statement must contain each of the 28 following informational areas:

- A comparison of the proposed rule to parallel federal rules or standards set by a state or national licensing agency or accreditation association, if any exist.
- If requested by the ORR or the committee, a comparison of the proposed rule to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.
- An identification of the behavior and frequency of behavior that the rule is designed to alter.
- An identification of the harm resulting from the behavior that the rule is designed to alter and the likelihood that the harm will occur in the absence of the rule.
- An estimate of the change in the frequency of the targeted behavior expected from the rule.
- An identification of the businesses, groups, or individuals who will be directly affected by, bear the cost of, or directly benefit from the rule.
- An identification of any reasonable alternatives to regulation pursuant to the proposed rule that would achieve the same or similar goals.

- A discussion of the feasibility of establishing a regulatory program similar to that proposed in the rule that would operate through market-based mechanisms.
- An estimate of the cost of rule imposition on the agency promulgating the rule.
- An estimate of the actual statewide compliance costs of the proposed rule on individuals.
- A demonstration that the proposed rule is necessary and suitable to achieve its purpose in proportion to the burdens it places on individuals.
- An estimate of the actual statewide compliance costs of the proposed rule on businesses and other groups.
- An identification of any disproportionate impact the proposed rule may have on small businesses because of their size.
- An estimate of the ability of small businesses to absorb the following estimated costs without suffering economic harm and without adversely affecting competition in the marketplace:
 - An identification of the nature of any report required and the estimated cost of its preparation by small businesses required to comply with the proposed rule.
 - An analysis of the costs of compliance for all small businesses affected by the proposed rule, including costs of equipment, supplies, labor, and increased administrative costs.
 - An identification of the nature and estimated cost of any legal consulting and accounting services that small businesses would incur in complying with the proposed rule.
- An estimate of the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lesser standards for compliance by small businesses.
- An identification of the impact on the public interest of exempting or setting lesser standards of compliance for small businesses.
- A statement describing the manner in which the agency reduced the economic impact of the rule on small businesses or a statement describing the reasons such a reduction was not feasible.
- A statement describing how the agency has involved small businesses in the development of the rule.
- An estimate of the primary and direct benefits of the rule.
- An estimate of any cost reductions to businesses, individuals, groups of individuals, or governmental units as a result of the rule.
- An estimate of any increase in revenues to state or local governmental units as a result of the rule.
- An estimate of any secondary or indirect benefits of the rule.
- An identification of the sources the agency relied upon in compiling the regulatory impact statement, including the methodology utilized in determining the existence and extent of the impact of a proposed rule and a cost-benefit analysis of the proposed rule.
- A detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule upon small businesses.
- Any other information required by the ORR.

ARGUMENTS:

For:

As stated above, proponents of the bill believe that by limiting how often state agencies can promulgate rules that are more stringent than those of the Federal Government, Michigan will be more attractive to new businesses and be more likely retain existing ones. Policies that are more stringent than federal ones should be considered and passed by the legislature, they added, not at the executive level.

Against:

Opponents of the bill argue it unnecessarily restricts the ability of state agencies to respond to changing circumstances, and point out that the term "more stringent" is not defined. This lack of clarity, they say, could lead to costly legal battles over whether rules are actually more stringent than the applicable federal ones. Critics also said in testimony that while the legislature can always surpass federal rules via new public acts, the legislative process is, at times, slower than the rulemaking process. This would hinder the ability of the state to take action when it is needed, potentially leading to needs going unmet in emergencies.

POSITIONS:

The following indicated support for HB 5613:

Michigan Manufacturers Association (5-25-16)
Home Builders Association of Michigan (5-25-16)
St. Marys Cement (5-25-16)
National Federation of Independent Business (5-18-16)
Michigan Farm Bureau (supports the concept, 5-18-16)

The following indicated they were opposed to HB 5613:

Department of Licensing and Regulatory Affairs (5-25-16)
Michigan League of Conservation Voters (5-25-16)
Michigan AFL-CIO (5-25-16)
Sierra Club (5-18-16)
Michigan Environmental Council (5-18-16)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.