

**APA: EXTEND TIME LIMIT FOR
LEGISLATURE TO REJECT RULES**

**House Bill 4511 as enrolled
Vetoed by the governor**

**Sponsor: Rep. John Pappageorge
House Committee: Government
Operations
Senate Committee: Government
Operations**

Second Analysis (7-22-03)

THE APPARENT PROBLEM:

Many state statutes require agencies to promulgate rules to better effectuate the statutes' intended purposes. The process for promulgating these rules is spelled out in the Administrative Procedures Act of 1969 (APA), which has undergone several changes in recent years. The rulemaking process was substantially amended as a result of the creation of the Office of Regulatory Reform (ORR) and in the aftermath of a series of court decisions that effectively removed any involvement by the legislature in the rulemaking process (see **BACKGROUND INFORMATION**).

Currently, an executive agency must follow certain steps in proposing administrative rules, including transmitting a proposed rule to the Joint Committee on Administrative Rules of the legislature (JCAR). The committee has 21 calendar days to consider a rule and object to it by filing a notice of objection based on the grounds listed in the act. If the committee objects to a rule, the statute requires that the committee chair, vice chair, or other member of the committee cause bills to be introduced simultaneously in both houses of the legislature. The bills must rescind a rule upon its effective date, repeal the statutory provision under which the rule was authorized, or stay the effective date of the proposed rule for up to one year. If both houses of the legislature do *not* adopt the legislation within the 21-day time limit, the Office of Regulatory Reform may file the rule with the secretary of state to take effect after seven days.

The filing of a notice of objection to a proposed rule by JCAR stays the ability of the Office of Regulatory Reform to file the rule with the secretary of state (thus delaying the rule from taking effect) for 21

calendar days (although the time period is tolled during periods when the legislature is not in session). Further, an agency may withdraw a proposed rule under certain circumstances, and the 21-day time period is tolled until the rule is resubmitted. It is believed by some, that the 21-day requirement within which the legislature must act is too short.

THE CONTENT OF THE BILL:

The bill would amend the Administrative Procedures Act to modify the procedure for legislative objections to executive branch proposed rules. Generally, the time period granted to the legislature for consideration of rules would be extended from 21 calendar days to 30 session days. In addition, the bill would add certain publication and notification requirements. The bill would define "session day" to mean a day in which a quorum of both the House of Representatives and the Senate, following a call to order, officially convenes in Lansing to conduct legislative business.

The bill would require the Office of Regulatory Reform to publish on its web site the required agency report on a proposed rule, containing a synopsis of the comments of the required public hearing record and describing any changes in the proposed rule made by the agency after the public hearing. The publication would have to be made within five days after the ORR received the agency's report. Further, the bill would require an agency proposing a rule to transmit, electronically or by mail if requested, a copy of the proposed rule to each person who presented data, views, questions, or arguments during the public hearing on the proposed rule. This transmission would have to be done at the time the

agency submits a proposed rule to the Legislative Service Bureau for its formal certification as described in the act.

MCL 24.245 and 24.245a

BACKGROUND INFORMATION:

Constitutional Issues. In recent years, the role of the Joint Committee on Administrative Rules has been shrouded in uncertainty following a series of court rulings that held sections 45 and 46 of the Administrative Procedures Act to be unconstitutional. At issue in these cases were the prisoner visitation policies of the Department of Corrections. Initially, the department developed these policies outside of the rules process. However, after inmates challenged the policies - arguing that they should have been developed as administrative rules in accordance with the APA - the policies were formally promulgated as administrative rules. The inmates challenged the policy again, this time on the grounds that the rules were promulgated without subjecting them to review by JCAR or the legislature. In 1995, the Jackson County Circuit Court held that the rules were acceptable, and said that sections 45 and 46 of the APA were unconstitutional. The case was appealed to the Michigan Court of Appeals and the court consolidated the case with a similar case arising from Ingham County.

In 1997, the court of appeals ruled in *Blank v. Department of Corrections*, 222 Mich App 385, that section 45 of the APA violated the enactment and presentment clauses of Article 4 of the state constitution (thereby invalidating section 46), and that section 45 violated the doctrine of separation of powers. The court further held that sections 45 and 46 were severable from the remainder of the APA. Finally, the court upheld the rules despite the fact that typically the failure of an agency to follow the process of the APA would render the rule void.

The court of appeals struck down section 45 based on its reading of sections 1, 22, 26, and 33 of Article 4 of the state constitution. Section 1 vests the legislative power in the House and Senate. Section 22 provides that legislation shall be by bill and may originate in either house. Section 26 provides that no bill shall become a law without the concurrence of a majority of the members elected to and serving in each house. Finally, section 33 requires every bill passed by the legislature to be presented to the governor before it becomes law.

In invalidating the legislature's role in the rulemaking process, the court of appeals stated, "[b]ecause the procedures in section 45 do not mirror the requirements of article 4 of our constitution, the Legislature is interfering with the delegated authority by something short of a 'law'. By giving the JCAR the authority to veto administrative rules proposed by an executive agency, the Legislature has delegated legislative power to a smaller legislative body that can effectively negate a valid action of an agency without following the restrictions of article 4 of our constitution."

The court of appeals also said that in violating the enactment and presentment clauses of article 4, section 45 of the APA also violated the doctrine of separation of powers. The court stated, "[b]ecause there is no provision in section 45 of the APA for presentment to the executive for approval of the Legislature's veto of a rule, such legislative power in regard to rule-making goes essentially unchecked, and unchecked power is precisely what the separation of powers doctrine sought to avoid." Further, the court noted that there was already a process in the APA whereby the legislature could register its disapproval of a proposed rule. Under that provision (MCL 24.251), if JCAR, an appropriate standing committee, or a member of the legislature believes a promulgated rule is unauthorized, not within the legislative intent, or inexpedient, JCAR or a member may introduce a concurrent resolution that expresses the determination of the legislature that the rule should be amended or rescinded or may introduce a bill that amends or rescinds the rule. The court noted that if the legislature approves a concurrent resolution expressing its disapproval of a rule, "the legislature in essence is making a recommendation to the administrative agency to withdraw or amend the rule." However, that method has no legal effect on the rule. For JCAR or a member of the legislature to legally impact the rule, a bill must be introduced and go through the law-making process.

In 2000, the Michigan Supreme Court upheld the court of appeals' decision to invalidate the legislative approval provisions on the APA (see *Blank v. Department of Corrections*, 462 Mich 103). In striking down the relevant portions of the APA, the court, relying on the U.S. Supreme Court's decision in *INS v. Chada* (1982), said the actions of JCAR or the legislature under sections 45 and 46 were inherently legislative and, therefore, in violation of the enactment and presentment clauses in Article 4 of the state constitution and the doctrine of separation of powers embedded in Article 3, Section 2 of the state constitution. However, the supreme court differed

with the court of appeals on the extent to which sections 45 and 46 were deemed unconstitutional. The court of appeals had struck down the two provisions in their entirety, meaning that portions of the authority granted to the Office of Regulatory Reform were also eliminated. However, the supreme court ruled that only subsections 8, 9, 10, and 12 of section 45, and the second sentence of subsection 1 of section 46 - which required an agency to file a rule with the Secretary of State until at least 10 days after approval of JCAR or the legislature – were involved.

Under the old rulemaking process, after the rules were drafted, submitted to review of the LSB, made subject to a public hearing, and reviewed by the attorney general, they were submitted to JCAR for review. The committee had two months to consider the proposed rule (though the time for review could be extended for one additional month). If JCAR approved of the rule within the time required, a certificate of the committee's approval would be attached to copies of the rule. If JCAR disapproved the proposed rule, the committee would report that fact to the legislature and return the rule to the agency. A rule could not be promulgated by the agency unless (1) the legislature adopted a concurrent resolution approving the rule within 60 days after the committee report was received by each house, or (2) JCAR subsequently approved the rule. If JCAR did not take any action within the time required, it would return the rule to the agency, and the chairperson or alternate would introduce a concurrent resolution in both houses approving the rule that would be placed directly on the calendar. The rule could not be promulgated unless the legislature adopted the concurrent resolution within 60 days or the rule was resubmitted to and approved by JCAR. Once the committee or the legislature approved the rule, the agency would formally adopt the rule.

The Current Rulemaking Process. Following the court of appeals decision in *Blank v. Department of Corrections*, Public Act 262 of 1999 (Senate Bill 877) created the following rulemaking process:

- An agency submits a request for rulemaking (RFR) to ORR, which forwards a copy of the request to JCAR.
- ORR approves or disapproves the RFR or requests additional information, and forwards a list of approvals and disapprovals to JCAR.
- ORR reviews the draft rule language, grants or denies the ability of the agency to hold a public hearing on the proposed rule, or requests changes in

the draft language. If approval of a public hearing is granted, ORR submits a copy of the draft rules to JCAR, and the agency submits the draft rules to the Legislative Service Bureau, which reviews the rules for proper form, classification, and arrangement.

- The agency schedules a public hearing and notifies ORR, which, in turn, forwards a copy of the notice to JCAR. JCAR is permitted to meet and consider the proposed rules, take testimony, and provide the agency with an *informal* response to the rule.
- The agency holds a public hearing, after which the proposed rules and any changes are submitted to the LSB for formal approval as to proper form, classification, and arrangement.
- Within one year of the last public hearing, the agency provides JCAR with a transmittal letter, public hearing report, a copy of the rule, LSB and ORR certification, and a regulatory impact statement.
- The process then continues within JCAR as described earlier (see ***THE APPARENT PROBLEM***). It should be noted that JCAR may only file a notice of objection in any of the following circumstances:

- the agency lacks statutory authority for the rule;
- the agency exceeded the statutory scope of its rulemaking authority;
- there exists an emergency that would warrant disapproval;
- the rule conflicts with current state law;
- a substantial change in circumstances has occurred since the enactment of the law upon which the proposed rule is based;
- the rule is arbitrary or capricious; or
- the rule is unduly burdensome.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact regarding the requirements that the Office of Regulatory Reform publish agency reports on its web site, and that agencies mail copies of a proposed rule, if requested, to each person who presented data, views, questions, or arguments at a public hearing on the proposed rule. (SFA analysis, 5-29-03)

ARGUMENTS:***For:***

When Senate Bill 877 of the 1999-2000 session made its way through the legislative process, one of the few complaints about the bill was that the time period within which JCAR had to review a proposed rule was too short. Under the current rulemaking process, if JCAR files a notice of objection to a proposed rule, the legislature has 21 calendar days to consider bills that would repeal the rule upon its effective date, repeal the statute upon which the rule is based, or stay the rule's effective date for up to one year. In essence, the legislature has 21 days to draft a bill and pass the bill in both houses. This 21-day time requirement hardly gives the legislature sufficient time to properly and thoroughly review the issues surrounding the proposed rule and essentially voids the legislature's role in the rulemaking process. Therefore, extending the time requirement gives the legislature the time necessary to review the merits of a proposed rule.

legislators a chance to be proactive and allows them to help shape the many agency rules that affect Michigan residents." That being said, the governor stated, "[t]he current review process is sufficient. House Bill 4511 does not contribute to the efficient and effective administration of state government."

Against:

The extended time requirements make a long process even longer. Giving the legislature the added review time could greatly hinder an agency's ability to effectively carry out its functions. Further, during the deliberations on Senate Bill 877, the Senate defeated a proposed amendment that would have increased the time requirement to 60 days. At the time, it was believed that nothing prevented the legislature from enacting legislation at a later date that would rescind the rule, if the legislature failed to act within the time required. That argument still holds today.

Response:

The APA allows an agency to promulgate emergency rules without following the notice and participation requirements, if doing so is necessary to preserve the public health, safety, or welfare, and the governor concurs in determining that such an emergency exists.

Against:

In vetoing the bill, Governor Granholm cited JCAR's own description of the 1999 amendments to the APA that gave rise to current process, which stated, "[t]he amendments give JCAR members greater opportunity for involvement and inquiry during the rulemaking process. From an agency's initiation of the rulemaking process by Request for Rulemaking (RFR), to the final 21-day JCAR review period, Committee members can track and take an active role in the development of administrative rules. Ultimately, the new JCAR review process gives

Analyst: M. Wolf

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