Legislative Analysis

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RESTRICT STATE AGENCIES FROM ADOPTING RULES MORE STRINGENT THAN FEDERAL RULES

House Bill 4205 as enacted
Public Act 602 of 2018
Sponsor: Rep. Triston Cole
House Committee: Oversight
Senate Committee: Oversight
Complete to 2-11-19

SUMMARY:

House Bill 4205 amends sections 32 and 45 of the Administrative Procedures Act (APA) to prohibit a state agency from adopting rules more stringent than the applicable federally mandated standard unless the director of that agency determines that there is a "clear and convincing need" to exceed the federal standard. This applies when the federal government has mandated that Michigan promulgate rules.

If the federal government has not mandated that Michigan promulgate rules, then an agency may only promulgate more stringent rules if specifically authorized by statute to do so or if the director of that agency determines that there is a "clear and convincing need" to exceed the applicable federal standard.

There would be an exception in both cases for emergency rules promulgated under Section 48 of the APA, which applies generally to rules aimed at the preservation of the public health, safety, or welfare.

The above provisions would also not apply to the amendment of the Special Education Programs and Services Rules, R 340.1701 to R 340.1862 of the Michigan Administrative Code. However, if those rules are rescinded, the above provisions would apply to the promulgation of new rules relating to special education.

If a proposed rule is more stringent than the applicable federal standard, the currently required regulatory impact statement must contain a statement of the specific facts that establish the clear and convincing need to adopt the more stringent rule and an explanation of the exceptional circumstances that necessitate the more stringent standard. If the more stringent rules were specifically authorized by statute, the impact statement could instead cite that statute.

MCL 23.232 and 23.245

The bill took effect January 1, 2019.

BACKGROUND INFORMATION:

In the APA, the term "agency" means "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state Civil Service Commission, or an association of insurers created under the Insurance Code of 1956... or other association or facility formed under that act as a nonprofit organization of insurer members."

BRIEF DISCUSSION:

Proponents of the bill, notably representatives of small business, say it is simply a common sense reform that requires more scrutiny and justification before rules stricter than those required by the federal government are imposed. This will ease the burden on state residents, property owners, and businesses and improve the state's business climate by reducing overregulation and associated costs.

Opponents of the bill have made the following points:

- In many cases, federal regulations are intended to be a floor for state regulation, not a ceiling, and state-level officials are the best judge of the unique circumstances that justify different standards for different locales. The current rules process has sufficient protections and opportunities for public input built in.
- In the case of Michigan, the need for special protections for the surrounding Great Lakes alone is justification for more stringent environmental and water quality regulations, which could be thwarted under this bill.
- The lack of definition of "stringent" and the vagueness that could plague evaluations of "clear and convincing need" will likely lead to more litigation and hinder the state from creating rules to protect the public.
- A somewhat similar, albeit more severe, bill was vetoed[1] in 2011 by Governor Snyder, who said it "sent the right message in the wrong way," and cited past and potential future needs for special regulations in such areas as ballast water, phosphorous discharge, cattle TB prevention, OSHA regulations, and Medicaid fraud, along with concerns about the identification of what constitutes an "applicable federal standard" when devising state regulation.

As to the last point, proponents argue that House Bill 4205 was drafted with the previous gubernatorial veto in mind and that it thus allows for state statutes to authorize more stringent rules; allows agency heads to make the case for such rules in regulatory impact statements that are a mandated part of the rules promulgation process; and provides for instances where emergency rules are needed for the preservation of the public health, safety, or welfare.

[1] https://www.michigan.gov/documents/snyder/LTR111130vetoHB4326_370088_7.pdf

FISCAL IMPACT:

House Bill 4205 would have an indeterminate fiscal impact on the state government. The magnitude and direction of this impact would depend on two factors: (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. It is not entirely clear what constitutes a "stringent" rule, and this uncertainty could require additional legislative guidance and/or judicial interpretation. Determining the enforcement costs would require financial analysis by the Office of Performance and Transformation to isolate the costs of enforcing the "stringent" provisions of administrative rules.

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