



Ohio Legislative Service Commission

Bill Analysis

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Am. S.B. 3

128th General Assembly
(As Passed by the Senate)

Sens. Faber, Carey, Wagoner, Buehrer, Cafaro, Cates, Coughlin, Fedor, Gibbs, Gillmor, Goodman, Hughes, Niehaus, Patton, Schaffer, Wilson, Stewart

BILL SUMMARY

- Eliminates, effective January 1, 2010, the requirement that a rule-making agency prepare and file with the Department of Development's Office of Small Business a rule summary and fiscal analysis for a proposed rule that is likely to affect individuals, small businesses, or small organizations.
- Requires, instead, that a rule-making agency, for a rule proposed on or after January 1, 2010, that "may have an adverse impact on small businesses," conduct a cost-benefit analysis, prepare a cost-benefit report, prepare a regulatory flexibility analysis, and prepare a description of actions taken to reduce the proposed rule's adverse impact on small businesses.
- Authorizes the Joint Committee on Agency Rule Review to recommend legislative invalidation of a proposed rule if the rule-making agency does not comply with the bill's analysis, reporting, and filing requirements.
- Promotes improved customer service in state agencies, and requires the Director of Administrative Services to establish customer service performance standards for nonelected officers and employees of state agencies, to be used in conducting annual performance reviews.
- Creates the Ohio Small Business Ombudsperson in the Office of Small Business and creates the Small Business Regulatory Review Board, each of which has duties under the bill's new review process.
- Expands the duties of the Office of Small Business and of the new Ombudsperson.

CONTENT AND OPERATION

Background and overview

Under continuing law, rule-making agencies that are required by statute to adopt rules under the Administrative Procedure Act (R.C. Chapter 119.) or the abbreviated rule-making procedure (R.C. 111.15) must file a proposed rule with the Joint Committee on Agency Rule Review (JCARR) for legislative review.¹ JCARR is a ten-member legislative joint committee that has the authority to review a proposed rule and that may recommend that the House and Senate adopt a concurrent resolution invalidating the proposed rule if JCARR finds with respect to the rule that (1) the agency exceeded the scope of its statutory authority in proposing the rule, (2) the rule conflicts with another rule adopted by the same or a different agency, (3) the rule conflicts with the legislative intent in enacting the statute under which the agency proposed the rule, (4) the agency failed to prepare a complete and accurate rule summary and fiscal analysis of the proposed rule, or (5) if a proposed rule incorporates a text or other material by reference, either the agency has failed to file the incorporated text or other material with JCARR or the incorporation by reference fails to meet existing law's standards governing incorporations by reference in rules.

In addition to filing the rule with JCARR, the rule-making agency must prepare and file with JCARR a rule summary and fiscal analysis (RSFA) of a rule proposed under the Administrative Procedure Act or the abbreviated rule-making procedure. If a proposed rule is likely to affect individuals, small businesses, or small organizations, the rule-making agency also must file an RSFA with the Office of Small Business in the Department of Development for its review and comment (R.C. 121.24).

The bill modifies the rule-making procedures by adding additional rule analyses and reporting duties for rule-making agencies and by requiring another layer of review for certain proposed rules. The bill eliminates the RSFA filing with, and review of a proposed rule by, the Office of Small Business, and in its place establishes this new review procedure. Generally, the bill requires that a rule-making agency prepare a cost-benefit report for, a regulatory flexibility analysis of, and a description of actions taken for, any proposed rule that "may have any adverse impact on 'small businesses,'" which the bill defines as an independently owned and operated business entity, including its affiliates, having fewer than 500 employees (R.C. 121.25(D)). The rule-making agency must submit the proposed rule and the report, analysis, and other documents to the

¹ In the bill and this analysis, "rule" includes the enactment ("adoption") of a new rule and the amendment or rescission of an existing rule. A "proposed rule" includes the original and each revised version of the same proposed rule. (R.C. 121.25(A) and (B).)

Ohio Small Business Ombudsperson, a position created by the bill, who manages the Office of Small Business. The Ombudsperson solicits comments concerning any adverse effect the rule may have on small businesses, compiles a report about the comments, and submits the report to the Small Business Regulatory Review Board created by the bill.

The Board, in turn, reviews the report and the objections to the proposed rule reflected in it and determines whether the rule-making agency complied with the bill's cost-benefit report, regulatory flexibility analysis, and filing requirements. If not, the Board issues a determination of noncompliance that explains why the proposed rule failed to comply and files the determination with JCARR. JCARR reviews the rule and may then recommend legislative invalidation of the proposed rule, under its existing rule review authority, if it determines that the rule-making agency has not complied with the bill's rule analyses, reporting, and filing requirements.

The bill assigns new duties to the Office of Small Business and the Ombudsperson, including requiring them to conduct an annual regulatory compliance audit of rules pertaining to small businesses to determine if there is duplicative reporting or recordkeeping, and to identify which rules have any adverse impact on small businesses. Those findings must be reported annually to the General Assembly.

Lastly, the bill addresses improving customer service in state agencies by requiring the Director of Administrative Services to establish customer service performance standards for nonelected officers and employees of state agencies, to be used in conducting annual performance reviews.

Rule-making procedure for rules that may have "any adverse impact on small businesses"

Cost-benefit analysis, cost-benefit report, and regulatory flexibility analysis requirements

(R.C. 121.25 and 121.251; Section 5)

Under the bill, if a rule-making agency intends to adopt a rule that, if adopted, may have any adverse impact on small businesses, the rule-making agency must do both of the following before filing the proposed rule with JCARR:

(1) Conduct a *cost-benefit analysis* to determine whether the proposed rule's effect on small businesses outweighs the benefits of the proposed rule, and prepare a *cost-benefit report* regarding the results of that analysis. The cost-benefit report must include:

- An identification and estimate of the number of small businesses subject to the proposed rule;
- The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of technical or professional skills necessary for preparation of any report or record required by the proposed rule;
- A statement of the rule's probable effect on the identified, impacted small businesses;
- A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule; and
- Any other information the rule-making agency considers necessary to fully explain its cost-benefit analysis regarding the proposed rule.

(2) Prepare an *analysis* of how each of the following methods might reduce any adverse impact the proposed rule may have on small businesses and incorporate into the proposed rule any of the methods that the rule-making agency finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rule:

- The establishment of less stringent compliance or reporting requirements for small businesses;
- The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- The consolidation or simplification of compliance or reporting requirements for small businesses;
- The establishment of performance standards for small businesses to replace design or operational standards required in the proposed rule; and
- The exemption of small businesses from any or all of the proposed rule's requirements.

These new requirements apply to a proposed rule, the original version of which is required to be filed with JCARR on or after January 1, 2010.

Filing requirements; publication by Ohio Small Business Ombudsperson

(R.C. 121.252 and 121.253)

At the same time a rule-making agency files with JCARR a proposed rule that may have any adverse impact on small businesses, the rule-making agency also must file all of the following in electronic form with the Office of Small Business, which, under the bill, is managed by the new Ohio Small Business Ombudsperson (discussed below):

- (1) The full text of the proposed rule;
- (2) The cost-benefit report regarding the proposed rule;
- (3) The analysis and any documentation that the rule-making agency conducted or used in support of its determination of any adverse impact the proposed rule may have on small businesses; and
- (4) A description of the actions the rule-making agency has taken to comply with the methods for reducing the rule's adverse impact on small businesses.

The Ombudsperson must publish in the Register of Ohio (1) through (4), above, and a notice informing persons that they may comment to the Ombudsperson concerning any adverse impact the proposed rule, if adopted, may have on small businesses. The notice must explain how persons may communicate comments to the Ombudsperson.

Any person may comment to the Ombudsperson concerning any adverse impact a proposed rule, if adopted, may have on small businesses. The Ombudsperson is required to establish and maintain, or participate in, a web site having features that enable persons to comment electronically. And the Ombudsperson must establish a toll-free telephone number persons may call to make comments. The telephone answering point must be equipped to record comments that are called in.

The bill requires that the Ombudsperson collate and review comments that are received with regard to a proposed rule, and compile them in a report that describes in detail the substance of the comments and, in particular, any objections to the proposed rule. The Ombudsperson must publish the report in the Register of Ohio and file it in electronic form with the rule-making agency that proposed the rule and with the Small Business Regulatory Review Board created by the bill. At the same time, the Ombudsperson must file in electronic form with the Board the full text of the proposed rule, the cost-benefit report, the analysis and supporting documentation, and the

description of actions taken by the agency to reduce the proposed rule's adverse impact on small businesses.

Rule review by the Small Business Regulatory Review Board

(R.C. 121.254)

The bill creates the Small Business Regulatory Review Board, consisting of nine members, all of whom represent small businesses (the Board is further discussed below). Within one week after receiving a report from the Ombudsperson, the Board is required to hold a meeting at which it must review the report, the proposed rule that is the subject of the report, the cost-benefit report, the analysis and supporting documentation, and the description of actions taken to reduce the proposed rule's adverse impact on small businesses. The Board must determine whether the rule-making agency proposing the rule has complied with the bill's cost-benefit reporting, analysis, and filing requirements.

The Board may conduct a public hearing on the proposed rule at which any person having an interest in the proposed rule may appear and offer comments on, or objections to, the rule, insofar as it may, if adopted, have any adverse impact on small businesses. The Board must give notice of the public hearing in the Register of Ohio at least 30 days before the date set for the hearing. In the notice, the Board must state the date and time when, and the place where, the public hearing will be held.

If the Board finds that a rule-making agency, in proposing a rule, has failed to comply with the bill's cost-benefit reporting, analysis, and filing requirements, the Board must issue in writing a determination of noncompliance that states the determination and explains why the proposed rule fails to comply. The Board may include in the determination of noncompliance suggested changes in the proposed rule that will bring the proposed rule into compliance with the bill's requirements. The Board must file the determination of noncompliance, the full text of the proposed rule, the cost-benefit report, the analysis and supporting documentation, and the description of actions taken by the agency to reduce the rule's adverse impact in electronic form with the rule-making agency and JCARR. And the Board must publish the determination of noncompliance in the Register of Ohio.

JCARR legislative review of the rule

(R.C. 119.03(I)(1)(f) and 119.031)

Once the determination of noncompliance is filed with JCARR, JCARR reviews the rule under its existing review procedures and may recommend legislative invalidation of the rule for any of the reasons discussed above in "**Background and**

overview." The bill adds to the reasons for recommending legislative invalidation of a rule the fact that the rule-making agency proposing the rule failed to comply with the bill's cost-benefit report, analysis, and filing requirements.

Small Business Regulatory Review Board--appointments and operation

(R.C. 121.255; Section 6)

The bill requires the Small Business Regulatory Review Board's nine members to be appointed as follows: five members are appointed by the Governor, two members are appointed by the President of the Senate, and two members are appointed by the Speaker of the House of Representatives. Each member must represent small business. These appointing authorities must make initial appointments to the Board for terms commencing on January 1, 2010. The terms of office of all members of the Board are for three years, beginning on January 1 and ending at the close of business on December 31. A vacancy on the Board is to be filled in the same manner as the initial appointment. Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed holds office for the remainder of the term.

Five members of the Board constitute a quorum, and the affirmative vote of five members is necessary for any action taken by the Board.

The Governor designates the chairperson of the Board from among the members appointed by the Governor. The chairperson must appoint a secretary from among the Board's members.

Board members serve without compensation, but are to be reimbursed for their necessary and actual expenses incurred in the performance of their Board duties.

Ohio Small Business Ombudsperson; new duties for Office of Small Business

(R.C. 103.0511, 122.08, and 122.081)

Under existing law, the Office of Small Business in the Department of Development is under the supervision of a manager appointed by the Director of Development. The Office performs various duties for the small business community, for example, acting as a liaison between them and state agencies, and generally helping small businesses resolve regulatory and licensing problems with state government.

The bill provides that the Office's manager is to be known as the Ohio Small Business Ombudsperson, who is to assume all of the current Office manager's duties.



The bill adds the following new duties to those that must be performed by the Office and the Ombudsperson:

(1) Comply with the publication, comment, review, and reporting requirements that apply to the Ombudsperson under the bill;

(2) Maintain and publicize a toll-free telephone number Ohio small businesses may call to reach the Ombudsperson, who shall assist those small businesses in complying with state regulatory requirements;

(3) Interface with other agencies to facilitate the resolution of small business regulatory issues;

(4) Provide all necessary staff and support for the Small Business Regulatory Review Board;

(5) Interface with small businesses in an effort to create and retain jobs in Ohio;

(6) Conduct an annual regulatory compliance audit to determine which, if any, rules pertaining to small businesses require duplicative reporting or recordkeeping of the same or substantially similar information for multiple regulatory entities;

(7) Conduct an annual assessment that identifies which rules have any adverse impact on small businesses;

(8) Prepare an annual report and submit it to the Governor and the General Assembly on or before January 1 each year. The report must contain the results of the annual regulatory compliance audit and must recommend how to minimize any adverse impact of rules identified under the annual assessment.

The bill applies the same definition of "small business" that is used for purposes of rule-making review under the bill to the duties of the Office and Ombudsperson. Consequently, the Office and Ombudsperson perform their duties for business entities having fewer than 500 employees.

Under existing law, the Office may assist a state agency, at the agency's request, in preparing a rule that affects individuals, small businesses, or small organizations. Under the bill, the Office must assist a state agency requesting assistance if the rule affects small businesses. And the Office must train rule-making agency personnel on methods to be used to conduct a cost-benefit analysis, to prepare a cost-benefit report, and to prepare an analysis of how the adverse impact of a proposed rule on small businesses may be reduced.

The Office also must continue publishing the Small Business Register of rules affecting small businesses, but under the bill, the Register will address proposed rules that may have any adverse effect on small businesses, rather than rules for which RSFAs were filed with the Office.

Improve state agencies' customer service

(R.C. 121.021, 124.04(M), and 124.95)

The bill provides that it is the policy of the state to improve customer service in state agencies. Each state agency therefore is to emphasize improved customer service, efficiency, and productivity in employee orientation, personnel training, and employee performance reviews.

The bill requires the Director of Administrative Services, on or before January 1, 2010, to develop and adopt rules under the Director's specific rule-making powers, and thereafter to amend or rescind rules, that establish customer service performance standards for officers and employees of state agencies, excluding officers who are elected. The performance standards must be specific to the various positions in each state agency and must be based on the duties, responsibilities, requirements, and qualifications of the positions. The performance standards are to be applied to and used in conducting each employee's annual performance review.

The Director is required by the bill to solicit recommendations concerning improving customer service from human resource professionals, and, before adopting the rules, must consider the recommendations that are submitted.

The state agencies to which these requirements apply are every organized body, office, or agency established by Ohio law for the exercise of any function of state government, but excluding any court or judicial agency, the General Assembly or any legislative agency, or the Controlling Board.

Other revisions

(R.C. 111.15, 117.20, 121.39, 122.94, and 1710.02; repeal of R.C. 121.24)

The bill revises various statutes to reflect the repeal of the law that requires a rule-making agency to file an RSFA with JCARR and the Office of Small Business if a proposed rule is likely to affect individuals, small businesses, or small organizations. That law is no longer needed because the proposed rule would be analyzed and reviewed under the bill's new small business rule review procedures.

HISTORY

ACTION

DATE

Introduced

02-10-09

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03-11-09

Passed Senate (30-0)

03-11-09

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