



# Ohio Legislative Service Commission

## Bill Analysis

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### Sub. H.B. 396\*

129th General Assembly

(As Reported by H. State Government & Elections)

Reps. McGregor and Murray

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## BILL SUMMARY

- Revises rule-making and rule review procedures.

### *Legislative invalidation of proposed and existing rules by bill*

- Requires the General Assembly to invalidate proposed rules, not by concurrent resolution, but by bill.
- Requires the General Assembly to invalidate existing rules that are being reviewed under the Periodic Review of Rules Act, not by concurrent resolution, but by bill.

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\* This analysis was prepared before the report of the House State Government and Elections Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

Under the Legislative Review of Rules Act and the Periodic Review of Rules Act, the Joint Committee on Agency Rule Review (JCARR) is authorized to recommend that the General Assembly adopt a concurrent resolution invalidating proposed rules or existing no change rules (see below) that were reviewed under those laws.<sup>1</sup> The bill requires such an invalidation to be carried out, not by means of a concurrent resolution, but by means of a bill.<sup>2</sup>

To recommend enactment of such a bill, the Chairperson of JCARR, or another member of JCARR designated by the Chairperson, must prepare the recommendation of invalidation in writing. The recommendation must identify the proposed or existing rule, the agency that proposed or submitted the proposed or existing rule, and the finding that caused the joint committee to make the recommendation. The recommendation also must briefly explain the finding.

The Chairperson of JCARR must request the Legislative Service Commission to prepare a bill to invalidate the proposed or existing rule according to the recommendation. The bill must state the finding that caused JCARR to recommend invalidation of the rule.

The Chairperson of JCARR, or another member of JCARR designated by the Chairperson, must submit the bill to the clerk of either house of the General Assembly. The recommendation of invalidation and a copy of the proposed or existing rule also must be submitted to the clerk along with the bill.

A bill recommended by JCARR to invalidate a proposed or existing rule cannot be referred to any legislative committee other than the committee that has authority to set the calendar of bills for third consideration.

The failure of the General Assembly to enact a bill invalidating a proposed or existing rule is not a ratification of the lawfulness or reasonableness of the proposed or existing rule or a ratification of the validity of the procedure by which the rule was proposed or adopted.

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<sup>1</sup> R.C. 119.03(I) and 119.032.

<sup>2</sup> R.C. 101.35, 106.01, 106.02, 106.021, 106.022, 106.023, 106.03, 106.031, 106.032, 106.04, 106.041, 106.042, 111.15, 119.01, and 119.03.

### *Suspension of proposed and existing rules upon recommended invalidation*

- Declares that the rule-making proceedings pertaining to a proposed rule are suspended if the Joint Committee on Agency Rule Review (JCARR) recommends enactment of a bill to invalidate the proposed rule.<sup>3</sup>
- Declares that the operation of an existing rule being reviewed under the Periodic Review of Rules Act is suspended if JCARR recommends enactment of a bill to invalidate the existing rule.<sup>4</sup>

The bill specifies that such a suspension begins when JCARR votes to recommend invalidation of the proposed rule and ends on the earlier of (1) the day that is six months after the day the vote was taken or (2) the day both houses have adjourned sine die. The bill also declares that rule-making proceedings may resume, and that operation of an existing rule resumes, upon the ending of the suspension, unless an act invalidating the proposed or existing rule takes effect during the suspension or at any time thereafter, in which case the proposed or existing rule is invalid as provided in the act.

### *Legislative review December carry-over clause modified*

- Specifies that a *revised* version of a proposed rule that is filed with JCARR in December is to be reviewed legislatively not later than the 30th day after the first day of the legislative session in the following January.<sup>5</sup>

Under the Legislative Review of Rules Act, when the original or a revised version of a proposed rule is filed with JCARR in December, the proposed rule is carried over for review in the following January and then reviewed as if it were the original version of the proposed rule and had been filed on the first day of the legislative session in that January. The effect is to allow 65 days for legislative review of proposed rule that has been carried over, regardless of the pre-carry-over status of the proposed rule as original or revised. The bill rather distinguishes original and revised versions of proposed rules for purposes of the carry-over clause. Under the bill, if the *original* version of a proposed rule is filed with JCARR in December, it will continue to be reviewed legislatively as specified in current law. If, however, a *revised* version of a proposed rule is filed with JCARR in December, it will be reviewed legislatively not

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<sup>3</sup> R.C. 106.023.

<sup>4</sup> R.C. 106.032.

<sup>5</sup> R.C. 106.02 (second paragraph).

later than the 30th day after the first day of the legislative session in the following January.

### ***Legislative review mandatory***

- Clarifies that a proposed rule that is subject to legislative review cannot be adopted until the time for legislative review has expired without recommendation of a bill to invalidate the proposed rule.<sup>6</sup>

The bill clarifies that a proposed rule that is subject to legislative review cannot be adopted and filed in final form unless the proposed rule has been filed with JCARR and the time for JCARR to review the proposed rule has expired without recommendation of a bill to invalidate the proposed rule.

### ***Other bills invalidating rules not precluded***

- Clarifies that the procedures of the bill providing for invalidation of rules by bill do not preclude the introduction and consideration of bills invalidating rules that originate other than through those procedures.<sup>7</sup>

The procedures of the bill providing for invalidation of a rule by bill do not preclude a member of the General Assembly, on the member's own initiative, from drafting a bill that proposes to invalidate a proposed or existing rule and filing the bill for introduction, and do not preclude the House of Representatives or Senate from proceeding to consider such a bill. When such a bill is filed for introduction, it does not have the effect of suspending the proposed or existing rule, as is the case when JCARR recommends such a bill (see above).

### ***No change rules to be put through business review***

- Requires existing rules that, as a result of their review under the Periodic Review of Rules Act, are being filed as "no change" rules, to be put through business review.

Under current law recently enacted by the Common Sense Initiative Act,<sup>8</sup> beginning on January 1, 2012, proposed rules that are being drafted are put through business review before they begin the formal rule-making process. Business review is carried out by an agency in the Governor's Office, the Common Sense Initiative Office.

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<sup>6</sup> R.C. 106.023, 111.15(D), and 119.03(E).

<sup>7</sup> R.C. 106.041.

<sup>8</sup> S.B. 2 of the 129th General Assembly.

Under the bill, existing rules that, as a result of periodic review under the Periodic Review of Rules Act, are being filed as "no change rules" are subject to business review, just as draft rules currently are subject.

Under the Periodic Review of Rules Act, an agency is required, approximately every five years, to review its existing rules against several enumerated standards. One of the standards is whether an existing rule has an adverse impact on businesses, and whether any such adverse impact has been eliminated or reduced as required by the Common Sense Initiative Act. If the agency concludes that an existing rule has such an adverse impact on businesses, the bill requires the agency to amend or rescind the existing rule to reduce or eliminate the adverse impact in accordance with its review of the existing rule. If, however, the agency concludes that the existing rule does not have such an adverse impact on businesses, the bill requires the agency to file the rule without change for review under the Periodic Review of Rules Act. Such a rule is referred to as a "no change rule."

The bill makes no change rules subject to business review. An agency that files a no change rule must comply with the following procedural steps:

(1) The agency first must reconsider the no change rule against only the standard explained above pertaining to whether it has an adverse impact on businesses.

(2) If the no change rule does not have an adverse impact on businesses, the agency can proceed with filing the no change rule for legislative review.

(3) If, however, the no change rule has an adverse impact on businesses that has not been eliminated or reduced, the agency must prepare a business impact analysis that describes its review of the no change rule against the standard explained in (1) above and that explains why the no change rule is not being amended or rescinded to reduce or eliminate its adverse impact on businesses.

(4) The agency must transmit a copy of the full text of the no change rule and the business impact analysis electronically to the Common Sense Initiative Office (CSIO). The CSIO must make the no change rule and analysis available to the public on its web site.

(5) The CSIO must evaluate the no change rule and business impact analysis against the Business Impact Analysis Instrument and any other relevant criteria, and is authorized, but not required, to prepare and transmit recommendations to the agency

on how the no change rule might be amended or rescinded to eliminate or reduce any adverse impact the no change rule has on businesses.<sup>9</sup>

*Note:* The Business Impact Analysis Instrument is a document prepared by the CSIO. The instrument functions as a tool for evaluating rules to determine whether the rules have an adverse impact on businesses.<sup>10</sup>

(6) The agency must consider any recommendations made by the CSIO.

(7) Not earlier than the 16th business day after transmitting the no change rule and business impact analysis to the CSIO, the agency must either (a) proceed to file the no change rule with the Joint Committee on Agency Rule Review (JCARR) for review under the Periodic Review of Rules Act as a no change rule, or (b) commence the process of rescinding the no change rule or of amending the no change rule to incorporate into the rule features the CSIO recommendations suggest will eliminate or reduce the adverse impact the rule has on businesses.

(8) If the agency receives recommendations from the CSIO, and determines not to amend or rescind the no change rule, the agency must prepare a memorandum of response that explains why the no change rule is not being rescinded or why the recommendations are not being incorporated into the rule.

JCARR does not have jurisdiction to review, and must reject, the filing of a no change rule if, at any time while the no change rule is in its possession, it discovers that the no change rule has an adverse impact on businesses and the agency has not complied with the procedure outlined above.<sup>11</sup> When the filing of a no change rule is rejected, it is as if the filing had not been made. The Joint Committee must electronically return a rule that is rejected to the agency, together with any documents that were part of the filing. The rejection does not preclude the agency from refileing the rule with JCARR after complying with the procedure outlined above. This power to reject the filing of a no change rule is in addition to JCARR's continuing power to recommend invalidation of a no change rule if the rule has not been properly reviewed and amended or rescinded when reviewed against the standards for periodic review, including the standard pertaining to reducing or eliminating adverse impacts on businesses.

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<sup>9</sup> R.C. 107.54(A)(2).

<sup>10</sup> See R.C. 107.52 (definition of when a rule has an "adverse impact on businesses") and 107.53 (Business Impact Analysis Instrument). Neither of these sections is in the bill.

<sup>11</sup> R.C. 106.031(C)(2).

### ***Extension or revival of review time for proposed rule if later version rejected***

- Extends or revives the time for legislative review of a proposed rule if JCARR rejected a later version of the proposed rule for noncompliance with business review procedures.

Under the Common Sense Initiative Act, the Joint Committee on Agency Rule Review (JCARR) can reject a proposed rule (just as it can a no change rule) if the rule is discovered to have adverse impact on businesses and the agency has not complied with the business review procedure.<sup>12</sup> The bill revives or extends the time for legislative review of a proposed rule when the last previously filed version of a proposed rule, the filing of a later version of which has been rejected by JCARR, remains in JCARR's possession, and the time for legislative review of that previously filed version has expired, or fewer than 30 days remain before the time for legislative review of that previously filed version expires. In such a case, recommendation of a bill to invalidate that previously filed version may be adopted not later than the 65th day after the day on which the filing of the later version was rejected. This deadline can be extended under the legislative review December carry-over clause (see above) that applies to proposed rules filed in December and that restarts their legislative review in the following January.

### ***Operational duration of emergency rules increased***

- Increases the period of time during which an emergency rule remains operative from 90 to 120 days.<sup>13</sup>

Under both the Administrative Procedure Act and the abbreviated rule-making procedure,<sup>14</sup> an emergency rule remains in operational effect for 90 days. The bill increases this period of time to 120 days. The 120-day period of time allows time for an agency to adopt a rule under the regular, nonemergency rule-making procedure.

### ***Procedural changes for adopting auditing rules***

- Eliminates the special exception that authorized the Auditor of State not to prepare a rule summary and fiscal analysis of proposed auditing rules, and

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<sup>12</sup> R.C. 121.83(B)(1).

<sup>13</sup> R.C. 111.15(B)(2) and 119.03(G).

<sup>14</sup> R.C. 111.15 (abbreviated rule-making procedure) and 119.03(G) (Administrative Procedure Act). (Both sections are in the bill.) The difference between the abbreviated rule-making procedure and the rule-making procedure of the Administrative Procedure Act is explained below in a note under "Recodification and correction of legislative review acts."

thereby brings the procedure for adopting auditing rules into conformity with general rule-making procedures.

- Authorizes the Auditor of State to send notices of the public hearing on proposed auditing rules and to transmit copies of proposed auditing rules by electronic mail.

### *Transition rules*

- Declares an emergency.<sup>15</sup>

The bill limits its emergency clause to the phase of the bill that completes the intent of S.B. 2 of the 129th General Assembly by providing for business review of existing rules. All other phases of the bill will take effect as usual on the 91st day after the bill becomes law and is filed with the Secretary of State.

The bill specifies that the new, relocated (see below) procedures for legislative review of proposed and existing rules do not apply to proposed or existing rules that are pending on the effective date of the bill, and that the old, not relocated law continues to apply to them.<sup>16</sup> If, however, the Joint Committee on Agency Rule Review recommends invalidation of a proposed or existing rule on or after the effective date of the bill, the invalidation is to be carried out by bill.<sup>17</sup>

### *Transitional duties of Legislative Information Systems*

- Requires Legislative Information Systems to program or reprogram the electronic rule filing system as necessary to enable electronic filing and other processing of rules as is required by the bill within six months after its effective date.<sup>18</sup>

The bill requires Legislative Information Systems, in consultation with the Director of the Legislative Service Commission, the Executive Director of JCARR, the Common Sense Initiative Office, and any other person or agency involved in the electronic rule filing system, to program or reprogram the electronic rule filing system as necessary to enable electronic filing and other electronic processing of rules and rule-making documents as is required by the bill. Legislative Information Systems is to

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<sup>15</sup> Sections 9 and 10 of the bill.

<sup>16</sup> Sections 5(A) and 6 of the bill.

<sup>17</sup> Sections 5(B) and 6 of the bill.

<sup>18</sup> Section 7 of the bill.



complete the programming or reprogramming as soon as reasonably possible after the effective date of the bill but not later than the day that is six months after that effective date. If, at the time a provision of the bill that contemplates electronic filing or other electronic processing of rules and rule-making documents takes effect, electronic filing or other electronic processing is not available, the provision is to be complied with manually until electronic filing or other processing is available.

*Note:* The electronic rule filing system is an electronic system that enables rules and rule-making and rule-related documents to be filed, and official responses to these filings to be made, exclusively by electronic means. The electronic rule filing system is operated and maintained by Legislative Information Systems.

### ***Recodification and correction of legislative review acts***

- Relocates and otherwise reorganizes the Legislative Review of Rules Act and the Periodic Review of Rules Act to cure their inaccurate locations in the Revised Code.

The Legislative Review of Rules Act and the Periodic Review of Rules Act are inaccurately located as part of the Administrative Procedure Act (APA).<sup>19</sup> This location is inaccurate because the two acts apply also to rules that are subject to the so-called abbreviated rule-making procedure.<sup>20</sup> But rules subject to the abbreviated rule-making procedure are not subject to the APA, and vice versa.

*Note:* When an agency's rule-making is subject to the Administrative Procedure Act, the agency is required, among other things, to give notice of its intention to adopt a rule, to hold a public hearing on the proposed rule, and to make an effort to inform persons subject to the rule of its adoption. When, however, an agency's rule-making is subject to the abbreviated rule-making procedure, the agency is not required to do any of these things, which is why the procedure is referred to as being abbreviated.<sup>21</sup>

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<sup>19</sup> R.C. Chapter 119.

<sup>20</sup> R.C. 111.15.

<sup>21</sup> Compare R.C. 119.03(A), (D), and (E) with R.C. 111.15(B). Both of these sections are in the bill.

The bill relocates several provisions to cure their currently inaccurate locations.<sup>22</sup> The following tables outline the relocations.

In the first table, the left-hand column indicates the topic of the law that is being relocated, the middle column indicates the current location of the law, and the right-hand column indicates the proposed new location of the current law.

<b>Topic</b>	<b>Current Location</b>	<b>Proposed New Location</b>
Procedure for legislative review of proposed rules	R.C. 119.01 and 119.03(I)	R.C. 106.02, 106.021, and 106.022
Filing proposed rules that are being adopted under the Administrative Procedure Act for legislative review	R.C. 119.03(H)	R.C. 119.03(C)
Procedure for periodic review, at five-year intervals, of existing rules	R.C. 119.032	R.C. 106.03 and 106.031

The following table presents the same information as the previous table, but the middle column indicates the new location of the law that is proposed to be relocated from the location indicated in the right-hand column.

<b>Topic</b>	<b>Proposed New Location</b>	<b>Current Location</b>
Procedure for legislative review of proposed rules	R.C. 106.02, 106.021, and 106.022	R.C. 119.01 and 119.03(I)
Filing proposed rules that are being adopted under the Administrative Procedure Act for legislative review	R.C. 119.03(C)	R.C. 119.03(H)
Procedure for periodic review, at five-year intervals, of existing rules	R.C. 106.03 and 106.031	R.C. 119.032

Except as explained in this analysis, current law that is relocated is continued at the new location with only stylistic improvement.

- Adjusts cross-references to make them reflect the relocated provisions they are referring to.<sup>23</sup>

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<sup>22</sup> Section 4 of the bill.

- Requires a rule summary and fiscal analysis of a proposed rule to include the electronic mail address of an individual or office within the agency that is responsible for coordinating and making available information about the proposed rule.<sup>24</sup>

*Note:* A rule summary and fiscal analysis (RSFA) is a form that is completed in the course of preparing a proposed rule. The RSFA is filed along with the proposed rule, and assists the public and JCARR in reviewing the proposed rule.

- Repeals obsolete provisions,<sup>25</sup> repeals surplus provisions,<sup>26</sup> and cures other technical defects<sup>27</sup> in rule-making and rule review procedures.

### *References to "119.032 review dates"*

- Specifies that references to the "119.032 review date" of a rule are to be read as if they referred to the sections providing for periodic review under the bill.<sup>28</sup>

The date by which the periodic review of an existing rule is to be completed has been referred to as its "119.032 review date." That number is the number of the Revised Code section under which periodic review of existing rules was carried out before the section was relocated by the bill (see above). Because of that relocation, periodic review of existing rules will be carried out, not under R.C. 119.032, but under R.C. 106.03 to 106.032. The bill therefore specifies that a reference to the "119.032 review date" of an existing rule is to be read as if it referred to periodic review of the rule under R.C. 106.03 to 106.032.

The bill recommends that the date by which the periodic review of an existing rule is to be completed be referred to as its "periodic review date."

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<sup>23</sup> R.C. 101.35, 103.0511, 111.15, 119.03, 119.04, 121.39, 121.73, 121.81, 121.82, 127.18, 1531.08, 3319.22, 3319.221, 3333.021, 3333.048, 3737.88, 3746.04, 4117.02, 5103.0325, 5117.02, 6111.31, and 6111.51.

<sup>24</sup> R.C. 127.18.

<sup>25</sup> R.C. 111.15, 119.01, 119.031, 119.04, 4141.14, and 5703.14.

<sup>26</sup> R.C. 121.74, 4141.14, and 5703.14.

<sup>27</sup> R.C. 103.0511 and 111.15.

<sup>28</sup> Section 6 of the bill.

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## HISTORY

### ACTION

### DATE

Introduced  
Reported, H. State Gov't & Elections

12-13-11  
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