

Colorado Legislative Council Staff Fiscal Note

**STATE
FISCAL IMPACT**

Drafting Number: LLS 15-0297
Prime Sponsor(s): Rep. Carver

Date: February 9, 2015
Bill Status: House SVMA
Fiscal Analyst: Alex Schatz (303-866-4375)

BILL TOPIC: REVIEW STATE RULES REDUCE BURDEN ON SMALL BUSINESS

Fiscal Impact Summary*	FY 2015-2016	FY 2016-2017
State Revenue		
State Expenditures	\$997,065	\$1,141,545
General Fund	862,342	966,102
Centrally Appropriated Costs**	134,723	175,443
FTE Position Change	11.0 FTE	12.8 FTE
Appropriation Required: \$862,342 - Various agencies (FY 2015-16)		

* This summary shows changes from current law under the bill for each fiscal year.

** These costs are not included in the bill's appropriation. See the State Expenditures section for more information.

Summary of Legislation

This bill modifies the Administrative Procedures Act (APA) to require the review of all existing administrative rules on a department-by-department basis. The bill also amends the APA to include specific procedures for the analysis of new rules that affect small businesses.

Department-by-department legislative rules review. The Office of Legislative Legal Services (OLLS) will review all existing rules of the principal departments of the state executive branch. Over the span of four fiscal years, from FY 2015-16 to FY 2018-19, the OLLS will review all current rules for compliance with existing statutory criteria, specifically that a rule must possess adequate statutory authority without exceeding that authority and must not be in conflict with other statutes. The schedule for departmental rules review is illustrated in Figure 1.

The Committee on Legal Services (COLS) reviews the recommendations of the OLLS in a public meeting and introduces a separate bill for any department that has promulgated a rule, or a portion of a rule, that the COLS votes to repeal. All rules not repealed in a departmental rules review bill remain in effect. Similar to the current rules review process, rulemaking agencies of the state are prohibited from repromulgating a rule that is repealed due to its rejection in review. The Secretary of State (SOS) directs the removal of repealed administrative rules from state legal materials.

Department-by-department executive branch rules review. Under current law, as enacted by Senate Bill 14-063, each principal department of the executive branch must consider options to continue, modify, or repeal existing administrative rules based on eight statutory criteria. The bill adds two new criteria to this review, specifically requiring consideration of whether an existing rule has an effect on small businesses and if other regulatory methods could reduce the impact of an existing rule on small businesses.

Figure 1. Statutory schedule for department-by-department rules review under HB15-1139.

Date of current rules subject to review	Principal departments to be reviewed	Legislative session for introduction of departmental rules review bill
November 1, 2014	FY 2015-16	2016
Agriculture, Education, Human Services, Personnel, State		
November 1, 2015	FY 2016-17	2017
Corrections, Health Care Policy and Financing, Labor and Employment, Law, Natural Resources, Revenue		
November 1, 2016	FY 2017-18	2018
Local Affairs, Public Health and Environment		
November 1, 2017	FY 2018-19	2019
Higher Education, Military and Veterans Affairs, Public Safety, Regulatory Agencies, Treasury		

Procedure for the review of new rules affecting small businesses. The bill amends the current definition of a small business under the APA to include only those companies of fewer than 500 employees that are independently owned and operated or those that have gross sales of less than \$6 million per year. To incorporate analysis of the potential impact of rules on small businesses, all state agencies subject to the APA are required to follow new procedures prior to the adoption of a rule.

In each principal department, an ombudsman is appointed from the existing staff. The ombudsman is charged with communicating efforts related to small businesses within the agency and in outreach to small businesses and other stakeholders.

When a contemplated rule is likely to have an impact on small businesses, the initial step of the rulemaking process under the APA, as amended by the bill, includes the invitation and active solicitation of input from small businesses. Thereafter, any proposed rule that may have an impact on small businesses must be accompanied by an economic impact statement, estimating the number of small businesses impacted, costs of compliance, and the nature of the impact. An economic impact statement also requires the agency proposing the rule to describe any less intrusive or less costly method to achieve the purpose of the rule.

All future rulemaking under the APA must incorporate regulatory flexibility analysis. This analysis requires the agency to consider regulatory methods that minimize the effect of a rule on small business. An agency must consider exempting small business from a proposed rule, though an agency may find that it does not need to take any particular action as a result of its regulatory flexibility analysis. A small business aggrieved by a new rule may obtain judicial review of the promulgating agency's consideration of five statutory criteria as part of required regulatory flexibility analysis.

The Office of Policy, Research, and Regulatory Reforms (OPRRR) in the Department of Regulatory Agencies (DORA) must be notified of any potential rule affecting small businesses. The OPRRR assists and advises agencies in compliance with regulatory flexibility analysis.

Background

The Code of Colorado Regulations. Administrative rules promulgated in accordance with the APA are compiled in the Code of Colorado Regulations (CCR). In total, the CCR encompasses 40 bound volumes. The rules of principal departments account for over 38 of these volumes, though the rules of other agencies, such as the Public Employees Retirement Association (PERA) are also subject to the APA and compiled in the CCR. Rules vary widely in length and complexity. The number of rules promulgated by the various principal departments and other state agencies subject to the APA also varies widely. As illustrated in Table 1, agencies with a broad regulatory mission, such as the Colorado Department of Public Health and Environment (CDPHE), generally expend the most effort promulgating and reviewing administrative rules.

Table 1. Principal department rules in the CCR, by fiscal year of review under HB15-1139			
Fiscal Year	Department	Estimated number of sections of rules*	Estimated number of CCR volumes*
FY 2015-16	Agriculture	53	1.0
	Education	75	1.0
	Human Services	35	3.5
	Personnel	19	1.3
	State	11	0.1
FY 2016-17	Corrections	1	0.1
	Health Care Policy & Financing	3	2.0
	Labor & Employment	20	2.0
	Law	6	0.3
	Natural Resources	54	2.0
	Revenue	49	3.0
FY 2017-18	Local Affairs	15	0.4
	Public Health & Environment	116	14.0
FY 2018-19	Higher Education	8	0.5
	Military & Veterans Affairs	1	0.1
	Public Safety	28	0.5
	Regulatory Agencies	124	6.5
	Treasury	2	0.1
Total (all FY)		620	38.4

* The estimated number of rules and number of volumes of the CCR for each principal department is based on an estimate provided by the OLLS. This estimate does not include repealed rules with residual citations in the CCR.

The APA and legislative rules review. Under current law, administrative rules must be within the authority of the state agency that promulgated the rule. Existing rules, new rules, and amendments to any rule must be statutorily authorized, not in excess of an agency's statutory authority, and not contrary to other provisions of Colorado statute. The OLLS applies these

statutory criteria to identify any rules that should be allowed to expire. Since 1976, the OLLS has reviewed all new or amended rules once, in the first year after rules are promulgated. The result of the OLLS review process is the annual rules review bill. Under current law, a rule that lacks statutory authority or is in conflict with other statute is disapproved by bill and allowed to expire. The rules review bill indefinitely extends the effective date of rules not found to violate statutory criteria.

The APA and executive branch rules review. Senate Bill 14-063 amended the APA to require each principal department to establish, in cooperation with DORA, a schedule for the review of existing administrative rules. This review applied eight new statutory criteria but was generally aligned with activities already taking place in the executive branch due to an executive order issued by the governor in 2012. Executive Order D2012-002 remains in effect until rescinded or superceded by a future executive order.

For new administrative rules, the APA currently requires an agency to conduct a regulatory analysis if requested in advance of the rulemaking hearing. This regulatory analysis includes a determination of whether there are less costly or less intrusive methods to achieve the purpose of a proposed rule.

Until statutory requirements are repealed on September 1, 2018, the OPRRR in DORA is tasked with managing a cost-benefit analysis in advance of the rulemaking hearing, applied to new rules selected at the discretion of the executive director of DORA. Among other aspects of cost-benefit analysis, when required, current law directs the promulgating agency to consider a proposed rule's effect on small business and to assess alternatives. In current practice, cost-benefit analysis is required by OPRRR in a small minority of rulemakings.

State Expenditures

Implementation of the bill increases state expenditures by **\$997,065 and 11.0 FTE in FY 2015-16** and by **\$1,141,545 and 12.8 FTE in FY 2016-17**, with similar impacts in the subsequent two fiscal years. Appropriations are necessary in FY 2015-16 to support substantial new workload and other expenses in OLLS and the Departments of Regulatory Agencies, Law, Public Health and Environment, Revenue, Human Services, Personnel and Administration, and Health Care Policy and Financing. Additional principal departments require budget appropriations in FY 2016-17. The bill increases workload in most state executive branch agencies, and certain other state agencies, on an ongoing basis. Table 2 summarizes expenditure impacts for the first two fiscal years of the bill's implementation across all affected state agencies.

Table 2. Expenditures Under HB15-1139		
Cost Components	FY 2015-16	FY 2016-17
Personal Services	\$674,383	\$845,020
FTE	11.0	12.8
Operating Expenses and Capital Outlay Costs	91,086	20,901
Legal Services	96,873	100,181
Centrally Appropriated Costs*	134,723	175,443
TOTAL	\$997,065	\$1,141,545

* Centrally appropriated costs are not included in the bill's appropriation.

Assumptions. The bill has four distinct cost drivers: an ombudsman in every principal department, new criteria in the executive branch review of existing rules, new rulemaking procedures for small businesses, and the four-year department-by-department legislative rules review. Each cost driver is an independent source of workload. For example, new APA procedures related to small business do not affect the bill's provisions for department-by-department review of existing rules.

Because this bill affects numerous departments and agencies in Colorado state government, some variation is expected in each agency's historical process of rulemaking, as well as variation in each agency's approach to new small business requirements in the APA. For the purposes of this analysis, a general case is assumed to assess the bill's overall impact:

- *Existing rules.* Since 1976, all new rules have been reviewed for compliance with the statutory criteria to be applied in the department-by-department legislative rules review. In addition, all proposed rules since 1967 have been submitted to the state Attorney General for an opinion on the legality of each new rule. As a result, most rules subject to department-by-department rules review are assumed to be compliant with the statutory criteria of legislative rules review.
- *New rules.* The determination of what new rules may affect small business is subjective. A large number of Colorado businesses will fall within the bill's amended definition of a small business. To ensure that new rules do not face unnecessary procedural challenges, any question of a proposed rule's effect on small business will prompt state agencies to engage in the new procedures required by the bill prior to final promulgation of the rule. As of the bill's effective date, most rulemaking under the APA will include small business procedures.

Office of Legislative Legal Services. The OLLS will expend \$117,554 to hire and provide operating expenses for 1.5 FTE between FY 2015-16 and FY 2018-19, to handle increased workload from the department-by-department rules review. These positions will be staff attorneys who will apply statutory criteria to existing administrative rules according to the bill's schedule, make written recommendations to the COLS, schedule an additional COLS meeting for each departmental review, and draft departmental rules review bills as required. To perform the department-by-department rules review, OLLS must acquire the CCR in printed binders.

Workload in the OLLS is not expected to increase as a result of new small business rulemaking procedures, which exclusively concern the APA's executive branch rules review provisions.

Department of Regulatory Agencies. As a high-volume rulemaking principal department, DORA will require an ombudsman and additional professional staff to prepare economic impact statements and perform regulatory flexibility analysis. These additional resources are incorporated in the analysis of principal departments below.

A new expenditure of 1.0 FTE is specifically required for DORA based on the OPRRR's duties in the bill. The OPRRR advises and assists all other state agencies in their efforts to comply with new APA requirements related to regulatory flexibility analysis. This new hire is in addition to the impact experienced by DORA as a principal department under the bill.

Department of Law. The Department of Law provides legal services to state agencies involved in the rulemaking process. The bill affects approximately 100 attorneys who each work approximately 40 hours per year under current law to counsel client agencies on rulemaking issues. The workload of these attorneys related to rulemaking is expect to increase, on average, by 20 percent to address issues arising as a result of the bill.

An increase of 800 attorney hours requires the Department of Law to increase expenditures by \$38,175 and an allocation of 0.4 FTE. Funding for increased legal services is reappropriated from client agencies according to hourly workload.

Principal departments. Principal departments are impacted by all four primary cost drivers. Each department will experience a different fiscal impact that depends on its current staffing, complexity and number of current rules, and probability that future rules substantially effect small businesses. With the exception of impacts specific to DORA, the Department of Law, and the SOS, Table 3 summarizes expenditure impacts to executive branch principal departments that require new appropriations for personal services and other costs.

Table 3. Summary of impacts to principal departments requiring new appropriations.		
Department	New FTE (starting fiscal year)* Personal services costs	Other costs
Public Health & Environment	3.2 FTE (FY 2015-16) \$187,146	Standard operating - \$3,040 Capital outlay - \$14,109 Legal (225 hours) - \$21,265
Regulatory Agencies	2.0 FTE (FY 2015-16) \$116,966	Standard operating - \$1,900 Capital outlay - \$9,406 Legal (500 hours) - \$47,255
Revenue	1.5 FTE (FY 2015-16) \$87,725	Standard operating - \$1,425 Capital outlay - \$9,406 Legal (200 hours) - \$18,902
Human Services	0.9 FTE (FY 2015-16) \$52,635	Standard operating - \$855 Capital outlay - \$4,703
Personnel	n/a (FY 2015-16)	Legal (100 hours) - \$9,451
Health Care Policy & Financing	0.5 FTE (FY 2015-16) \$29,242	Standard operating - \$475 Capital outlay - \$4,703
Labor & Employment	1.0 FTE (FY 2016-17) \$63,800	Standard operating - \$950 Capital outlay - \$4,703 Legal (35 hours) - \$3,308
Transportation	0.5 FTE (FY 2016-17) \$31,900	Standard operating - \$475 Capital outlay - \$4,703
Public Safety	0.3 FTE (FY 2016-17) \$19,140	n/a

* All new FTE in Table 3 are hired at the assumed classification of a General Professional IV.

Ombudsman. Though the ombudsman will be selected from existing staff in each principal department, the job of an ombudsman is expected to require substantial effort in departments with a significant number of rules. This workload increase results in the reallocation of some prior duties of the ombudsman to other personnel in a department. In the case of a department with multiple volumes of rules and continuous rulemaking procedures, the ombudsman's prior workload will be entirely reallocated, with a fiscal impact up to 1.0 FTE.

Executive branch rules review. The bill increases workload related to executive branch review of existing administrative rules pursuant to SB 14-063. While most existing administrative rules are assumed to comply with the statutory criteria applied in legislative rules review, the bill's two additional criteria for executive branch rules review may identify some existing rules that could be modified or repealed and reenacted in some other form to address small business concerns. Principal departments will generally absorb costs related to the additional review criteria. For departments with existing rules that significantly impact small businesses, additional resources may be necessary to respond with new rulemaking activities.

New rulemaking procedures. To promulgate new rules that potentially affect small business, the workload of a principal department will increase in proportion to the number of new and amended rules promulgated by that department. Substantial new workload related to new rules requires certain principal departments to hire new staff. Other principal departments will be able to comply with requirements to seek small business input, prepare and file economic impact statements, and perform regulatory flexibility analysis within current appropriations.

Department-by-department legislative rules review. No specific action is required of principal departments as the OLLS undertakes its department-by-department rules review. A minimal workload increase is expected for all affected departments, as they respond to inquiries from OLLS and attend public meetings of COLS. Principal departments with a relatively small number of rules do not require additional resources for this process. The fiscal note concludes that principal departments with a significant number of rules may require additional resources to the extent that existing rules pre-date the rules review process (e.g., pre-1976) or occupy areas of law where conflicting authorities have developed since promulgation. No significant areas of noncompliance with statutory criteria are identified in this fiscal note; thus, a principal department requiring additional resources to address such noncompliance may seek new resources in the annual budget process for the fiscal year in which the department is scheduled for department-by-department rules review.

Other state agencies subject to the APA. With limited exceptions, the APA applies to any board, commission, department, division, or other executive branch agency of the state. For agencies subject to the APA, the bill increases workload and costs associated with the promulgation of new and amended rules. Specifically, agency workload will increase to notify and solicit input from small businesses, prepare and file economic impact statements on rules affecting small businesses, and perform regulatory flexibility analysis on all bills. To the extent that the bill creates new requirements that result in the rejection of new rules in the OLLS and COLS annual rules review process, the bill increases workload for state agencies to promulgate emergency rules and repromulgate permanent rules.

Workload associated with new rulemaking procedures can be absorbed within the existing appropriations of non-principal departments and other state agencies with infrequent or less complex rulemaking. No specific need for new appropriations to any such other state agency is identified in this fiscal note. To the extent that frequent or complex rulemaking causes economic impact statements and regulatory flexibility analysis to overburden a state agency, additional resources may be requested in the annual budget process.

Secretary of State. The SOS has specific duties under the bill, in addition to impacts as a principal department described above. On a regular basis, the SOS updates the CCR and related references to administrative rules. Updating these state legal materials to reflect rule changes required by the bill will increase SOS workload. More frequent changes to state legal materials will require modifications to SOS information technology. Programming services provided by the Office of Information Technology to facilitate changes to the CCR will incur one-time costs of \$24,720 (240 hours x \$103/hr.) in FY 2015-16.

Judicial Department. The bill increases workload in the trial courts, primarily in Denver's Second Judicial District where the majority of state agencies are headquartered. The bill creates a right to judicial review when a small business alleges that it is aggrieved by failure to consider statutory criteria for regulatory flexibility analysis. This type of judicial review is expected to be infrequent, as agencies are generally expected to adhere to all relevant rulemaking requirements. No increase in appropriations to the Judicial Department is required.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. The centrally appropriated costs subject to this policy are estimated in the fiscal note for informational purposes and summarized in Table 4.

Table 4. Centrally Appropriated Costs Under HB15-1139*		
Cost Components	FY 2015-16	FY 2016-17
Employee Insurance (Health, Life, Dental, and Short-term Disability)	\$82,191	\$103,132
Supplemental Employee Retirement Payments	52,532	72,311
TOTAL	\$134,723	\$175,443

*More information is available at: <http://colorado.gov/fiscalnotes>

Technical Note

The Colorado Department of Transportation (CDOT) is a principal department of the executive branch. However, the introduced bill does not include CDOT in the schedule for OLLS review of existing administrative rules. If this portion of the bill is amended to include CDOT, the fiscal note will be updated accordingly.

Effective Date

The bill takes effect July 1, 2015.

State Appropriations

For FY 2015-16, the bill requires appropriations from the General Fund to multiple agencies, as follows:

- \$118,029 to the Office of Legislative Legal Services, and an allocation of 1.5 FTE;
- \$35,175 to the Department of Law, and an allocation of 0.4 FTE;

- \$225,560 to the Department of Public Health and Environment, and an allocation of 3.2 FTE; of this amount \$21,265 is reappropriated to the Department of Law for legal services;
- \$239,336 to the Department of Regulatory Agencies, and an allocation of 3.0 FTE; of this amount \$47,255 is reappropriated to the Department of Law for legal services;
- \$117,458 to the Department of Revenue, and an allocation of 1.5 FTE; of this amount \$18,902 is reappropriated to the Department of Law for legal services;
- \$58,193 to the Department of Human Services, and an allocation of 0.9 FTE;
- \$9,451 to the Department of Personnel; of this amount \$9,451 is reappropriated to the Department of Law for legal services;
- \$34,420 to the Department of Health Care Policy and Financing, and an allocation of 0.5 FTE; and
- \$24,720 to the Department of State; of this amount \$24,720 is reappropriated to the Office of Information Technology.

Departmental Differences

The fiscal note represents a least-cost implementation of the bill. In contrast to the FY 2015-16 cost of \$862,342 and 11.0 FTE estimated in the fiscal note, the aggregate impact of the bill in FY 2015-16 as assessed by affected agencies (including agencies with which there is no departmental difference) is \$2,062,898 and 23.0 FTE.

Table 5 highlights differences in the assessment of fiscal impact using FY 2015-16 as the point of comparison. This Departmental Difference section provides an overview of differences and does not provide a detailed cost comparison or a comparison of differences in subsequent fiscal years.

Department	Departmental estimate		Fiscal note estimate		Difference	
	Cost	FTE	Cost	FTE	Cost	FTE
Law	\$189,020	1.1	\$35,175	0.4	\$153,845	0.7
Public Health & Environment	478,286	6.3	225,560	3.2	252,726	3.1
Regulatory Agencies	550,981	5.3	239,336	3.0	311,645	2.3
Revenue	421,901	5.0	117,458	1.5	304,443	3.5
State	61,215	0.6	24,720	0.0	36,495	0.6
HCPF	63,202	0.9	34,430	0.5	28,772	0.4
Transportation*	58,089	0.8	0	0	58,089	0.8
Public Safety*	54,541	0.6	0	0	54,541	0.6
Total Difference					\$1,200,556	12.0

* The fiscal note finds that the Department of Transportation and the Department of Public Safety may implement the bill within existing resources in FY 2015-16, but will require additional appropriations starting in FY 2016-17.

There are multiple reasons why this fiscal note and some estimates prepared by state agencies vary in projected fiscal impact. These reasons include:

- New rulemaking procedures in the bill are analogous to existing procedures in the APA. While the bill makes economic impact statements and regulatory flexibility analysis mandatory in a significant number of cases, similar analysis is performed under current law for more impactful rules, and the less complex rules affected by the bill will not generate enough new workload to require new resources. In addition, many agencies conduct stakeholder meetings and other activities that result in proposed rules that specifically consider and accommodate small business interests. Thus, the current budget of rulemaking agencies generally includes sufficient resources to comply with new rulemaking procedures.
- The fiscal note assumes most existing agency rules comply with statutory criteria for rules review. Some agencies assumed a significant amount of workload associated with rules that are assumed to be repealed under the bill. The fiscal note does not find that such a large-scale repeal of rules will occur.
- The incremental effect of the bill on agency resources will depend on rulemaking activity in each specific agency. Agencies may apply discretion to the promulgation of new rules, reallocating resources and adjusting the rulemaking schedule to accommodate new requirements under the bill. To the extent that an overall deficiency in agency resources is evident after such actions are taken, additional resources may be requested in the annual budget process.

State and Local Government Contacts

All Departments