SUBJECT: Requiring agencies to consider legislative intent in rulemaking

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 8 ayes — Marchant, J. Davis, B. Cook, Elkins, Gattis, Goodman, Lewis, Villarreal

0 nays

1 absent — Madden

WITNESSES: For — *(Registered but did not testify:)* Dan Dodson, Texas Environmental Equity Alliance; Floyd Ivy, Thomas McIntire, and John Sumner, Texas Licensed Child Care Association; Michele Molter, Texas Apartment Association; Bill Stinson, Texas Association of Realtors

Against — None

BACKGROUND: The Administrative Procedure Act (Government Code, ch. 2001) governs the state agency rulemaking process.

DIGEST: *The author plans to offer a complete floor substitute in lieu of CSHB 425. The floor substitute is summarized in the Digest below.*

The floor substitute for HB 425 would require a state agency, in developing new rules to implement legislation, to research the legislative intent of the law that authorized the proposed rule, write a legislative history document to be included with notice of the proposed rule, and establish an internal review process for ensuring that the proposed rule was consistent with its legislative history. The research on legislative intent would have to include:

- confirming the names of the primary author and sponsor of the authorizing legislation;
- determining whether a statement or discussion of legislative intent was entered into the legislative journals; and
- verifying the standing of each primary author and sponsor as to their current membership in the Legislature.

If the bill author and sponsor were still members of the Legislature, the agency would have to inform them of its intention to adopt a rule before it gave public notice. The agency would have to deliver a copy of its notice to the author and sponsor when it filed notice with the secretary of state. No more than seven days before considering a rule for final adoption, the agency would have to deliver a copy to the author and sponsor, if the final rule differed from the proposed rule. The agency would have to notify the author and sponsor of the time and place of a public hearing held on the rule.

For emergency rules, the agency would have to deliver a copy of the rule and the reasons for its adoption to the author and sponsor when it filed this information with the secretary of state. If an agency gave abbreviated notice or held a hearing on an emergency rule, it would have to furnish the author and sponsor with a copy of the notice and the time and place of the hearing.

The agency would have to include in an order finally adopting a rule a summary of written comments received from legislators, along with the legislators' names, reasons why the agency disagreed with any written comments or proposals offered by a legislator, and a certification that the agency's legal counsel had found the rule to be consistent with the legislative intent described in the legislative history document.

An agency's failure to provide notice as required by the bill would not invalidate an action taken or a rule adopted.

The bill would take effect September 1, 2003. It would apply to proposed rules published in the *Texas Register* on or after October 1, 2003, and to emergency rules adopted on or after September 15, 2003.

SUPPORTERS SAY:

This bill is the product of a collaborative effort aimed at increasing the accountability of state agencies to legislators. Legislators should play a more prominent role in the rulemaking process used to implement most new laws, since they are the people who author and foster bills through the legislative process and who best understand their own intent.

Legislative goals often are not met because the author's intent is lost during rulemaking. In part, this is due to the fact that agencies are not required to consider legislative intent when adopting a rule, nor are agencies required to

notify a bill's author or sponsor when adopting rules in response to a law. Since agency rules heavily influence how effectively a law is implemented, they should reflect directly the intent of the people's elected representatives. About one-quarter of the Legislature's time is spent reinterpreting previously enacted statutes, which costs taxpayers money and squanders lawmakers' time during the state's brief legislative sessions.

Though this bill would require only the primary author and sponsor to be notified of a rulemaking, the agency would have to consider all debate and testimony in the legislative record. This would allow agencies to balance the weight of evidence from the record and would prevent a single legislator from diverting an agency from the collective intent of the Legislature.

The floor substitute should not have a fiscal note because it would exclude provisions in the committee substitute allowing the governor to suspend agency rules, so the Governor's Office should need no additional resources to implement the bill. The bill would not affect agencies' workload significantly, because it would apply only to proposed rules published after October 1, 2003, and agencies would not have to review their rules comprehensively. Most agencies affirm that they already consider legislative intent in rulemaking, so this bill should affect those agencies only minimally.

Existing legislative oversight mechanisms encourage agencies to consider the author's and Legislature's intent during rulemaking, but not all agencies do equally well in this regard. This bill would provide another check to ensure accountability, especially for agencies that do not consider intent routinely. It also would help prevent an agency from unintentionally misinterpreting the author's intent by ensuring that author had the opportunity to be involved more actively in rulemaking. The bill would not infringe on the independence of the executive branch but would help legislators exercise their existing legislative oversight authority more effectively.

OPPONENTS SAY:

A single legislator does not enact a bill — a majority of legislators do, and they may have differing intents. Limiting an agency's notification to the primary author and sponsor could skew the understanding of intent in cases where the author's intent differed from that of a majority of the legislators. Case law has established that an agency must look first at the plain language of a law when interpreting its meaning. However, sometimes an author's

understanding of a bill's impact is different from the bill's actual impact. An ample tradition of case law has been developed to address this issue, and legislators should not undo the work of the courts.

The fiscal note for CSHB 425 estimated a cost of about $2.3 million for fiscal 2004-05, including 13 new full-time employees for the Governor's Office. No fiscal note is available to show how the fiscal impact of the floor substitute might differ. Establishing intent involves reviewing the legislative record, testimony, and questions, which would burden an agency's already scarce resources. This bill would address no urgent need, yet would absorb state resources that are needed to pay for critical services.

This bill would shift power from the executive to the legislative branch in a manner that could violate the separation of powers established in the Texas Constitution. This could be a particular problem when a bill's author belonged to one political party or ideology and executive branch officials represented another, setting the stage for the rulemaking process to become a political, as well as a legal, battle.

There is no widespread problem with rules not reflecting legislative intent. In most instances, the Legislature enacts clear laws that leave little room for multiple interpretations. Although agencies are not required to consider legislative intent, most do so anyway. Legislators do not need this bill because they already may track implementation of their legislation, play an active role in the rulemaking process, and provide comment to the agency.

NOTES:

CSHB 425 would authorize the Legislative Budget Board (LBB) to issue a letter of clarification to an agency explaining the intent of an appropriations provision. It would allow a legislator's designated representative to participate in rulemaking in lieu of the legislator. It also would add language allowing a legislative committee to initiate independent review of a rule, allowing the presiding officer of the appropriate house to ask the governor to suspend an agency rule, and allowing the governor to suspend a rule by proclamation. The companion bill, SB 95 by West, passed the Senate on the Local and Uncontested Calendar on April 16 and has been referred to the House State Affairs Committee.