

SENATE BILL 1388

By Johnson

AN ACT to amend Tennessee Code Annotated, Title 4,
Chapter 5, relative to the Uniform Administrative
Procedures Act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 4-5-102, is amended by adding the following new subdivisions thereto:

() "Policy" means a set of decisions, procedures and practices pertaining to the internal operation or actions of an agency;

() "Publication" means a posting of materials on the appropriate web site by the secretary of state that have been submitted in accordance with this chapter or any other information for which the secretary of state is responsible;

SECTION 2. Tennessee Code Annotated, Section 4-5-106, is amended in the first sentence of subsection (d) by deleting the language "in the monthly administrative register" and by substituting instead the language "on the administrative register web site".

SECTION 3. Tennessee Code Annotated, Section 4-5-106, is further amended in the second sentence of subsection (d) by deleting the language "published in the administrative register" and by substituting instead the language "shall be published in the administrative register web site under the proclamation section".

SECTION 4. Tennessee Code Annotated, Section 4-5-108, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-108. Any legislation that, in whole or in part, amends or repeals any provision of this chapter shall be referred to the government operations committee by the speaker of each house.

SECTION 5. Tennessee Code Annotated, Section 4-5-202, is amended by deleting subsection (a) in its entirety and by substituting instead the following:

(a) An agency shall precede all its rulemaking with notice and a public hearing unless:

(1) The rule is adopted as an emergency rule;

(2) The proposed rule is posted to the administrative register web site within the secretary of state's web site within five (5) business days of receipt together with a statement that the agency will adopt the proposed rule without a public hearing unless within sixty (60) days after the first day of the month subsequent to the filing of the proposed rule with the secretary of state a petition for a public hearing on such proposed rule is filed by twenty-five (25) persons who will be affected by the rule, an association of twenty-five (25) or more members, a municipality, or by a majority vote of any standing committee of the general assembly. If an agency receives such a petition, it shall not proceed with the proposed rulemaking until it has given notice and held a hearing as provided in this section. The agency shall forward such petition to the secretary of state. The secretary of state shall not be required to compile all filings of the preceding month into one (1) document.

SECTION 6. Tennessee Code Annotated, Section 4-5-203(a), is amended by deleting subdivision (1) in its entirety and by substituting instead the following:

(1) Transmit written notice of the hearings to the secretary of state for publication in the notice section of the administrative register web site and, if a statute applicable to the specific agency or a specific rule or class of rules under consideration require some other form of publication, publish notice as required by that statute in addition to publication in the notice section of the administrative register web site. Such notice of a hearing shall remain on the web site until the date of such hearing;

SECTION 7. Tennessee Code Annotated, Section 4-5-203, is amended by deleting subsection (b) in its entirety and by substituting instead the following:

(b) Except as otherwise permitted by § 4-5-204(e), notice through publication on the administrative register web site shall be given at least forty-five (45) days prior to the date set for the hearing and shall be deemed to have been given five (5) business days from the date notice was transmitted to the secretary of state for such publication.

SECTION 8. Tennessee Code Annotated, Section 4-5-206, is amended by deleting the period at the end of subsection (a) and by substituting instead the language and punctuation "by rule number and title."

SECTION 9. Tennessee Code Annotated, Section 4-5-206, is further amended by deleting subsection (c) in its entirety and by substituting instead the following:

(c) No rule shall be filed under this chapter unless it complies § 4-5-211.

SECTION 10. Tennessee Code Annotated, Section 4-5-207, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-207. No rule shall become effective unless it complies with §§ 4-5-206 and 4-5-211. No rule, unless filed as an emergency rule pursuant § 4-5-208, shall become effective until seventy-five (75) days after the filing of such rule in the office of the secretary of state.

SECTION 11. Tennessee Code Annotated, Section 4-5-208, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-208.

(a) An agency may, upon stating its reasons in writing for making such findings, proceed without prior notice or hearing to adopt an emergency rule, if the agency finds that:

(1) An immediate danger to the public health, safety or welfare exists, and the nature of this danger is such that the use of any other form of rulemaking authorized by this chapter would not adequately protect the public;

(2) The rule only delays the effective date of another rule that is not yet effective;

(3) It is required by the Constitution, or court order;

(4) It is required by an agency of the federal government and adoption of the rule through ordinary rulemaking procedures described in this chapter might jeopardize the loss of a federal program or funds; or

(5) The agency is required by an enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of rulemaking procedures described elsewhere in this chapter for the promulgation of permanent rules.

(b) Such emergency rule shall become effective immediately, unless otherwise stated in the rule, upon a copy of such rule and a copy of the written statement of the reasons for the rule being filed with the secretary of state. The emergency rule may be effective for a period of not longer than one hundred sixty-five (165) days. An agency shall not adopt the same or a substantially similar emergency rule within one (1) calendar year from its first adoption, unless the agency clearly establishes that it could not reasonably be foreseen during the initial one hundred sixty-five-day period that such emergency would continue or would likely recur during the next nine (9) months. The adoption of the same or substantially similar rule through ordinary rulemaking procedures authorized by this chapter shall not be precluded by this section.

(c) The agency shall take steps to make emergency rules known to persons who will be affected by such rules. The secretary of state shall post the emergency rule filing to the administrative register web site within two (2) business days of filing. An emergency rule filing shall remain on the administrative register website until the filing expires. The secretary of state shall update relevant rules to reflect the filing and the expiration of emergency rules.

(d) In any action contesting a rule adopted in reliance upon this section, the burden of persuasion shall be upon the agency to demonstrate that the rule meets the criteria established by this section.

(e) An agency's finding of an emergency pursuant to this section shall not be based upon the agency's failure to timely process and file rules through the normal rulemaking process.

SECTION 12. Tennessee Code Annotated, Section 4-5-209, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-209. Any reference in this code to public necessity rules shall be deemed to be a reference to emergency rules as provided in § 4-5-208. The Tennessee code commission is directed to change all references to public necessity rules, wherever such references appear in this code, to emergency rules, as sections are amended and volumes are replaced.

SECTION 13. Tennessee Code Annotated, Section 4-5-211, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-211. No rule shall be filed in the office of the secretary of state until such rule has been filed with the office of the attorney general and reporter. The office of the attorney general and reporter shall review the legality of every rule filed pursuant to this section and shall approve or disapprove of rules based upon the attorney general's

determination of the legality of such rules. The attorney general and reporter shall not disapprove an emergency rule filed pursuant to § 4-5-208 solely on the basis of failure to meet the statutory criteria for adoption of the rule contained in this chapter, unless the attorney general and reporter determines and states in writing that the attorney general and reporter could not defend the legality of the rule on the basis of failure to meet the statutory criteria for adoption of the rule contained in this chapter, in any action contesting the legal validity of the rule. If more than forty-five (45) days have passed since a rule was filed with the office of the attorney general and such rule has not been approved or disapproved by the attorney general and reporter, then such rule may be filed in the office of the secretary of state. An affidavit attesting to the filing of rule with the office of attorney general and reporter for more than forty-five (45) days without receiving approval or disapproval by the attorney general and reporter shall be submitted upon the filing of such rule with the secretary of state.

SECTION 14. Tennessee Code Annotated, Section 4-5-215, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-215.

Prior to the effective date of a rule, the agency proposing the rule may stay the running of the seventy-five day period required by § 4-5-207 for a period of time not to exceed sixty (60) days. Such stay shall become effective at the time the agency files written notice with the secretary of state and shall specify the length of the effectiveness of the stay. Prior to the expiration date of the stay, such stay may be withdrawn by the agency. Withdrawal or expiration of the stay shall reactivate the running of the balance of the seventy-five-day period that remained upon the date the stay was filed.

SECTION 15. Tennessee Code Annotated, Section 4-5-218, is amended by deleting subsection (e) in its entirety.

SECTION 16. Tennessee Code Annotated, Section 4-5-220, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-220.

(a) After a rule is filed, the secretary of state shall add the filing to the appropriate location within the portion of the secretary of state's web site devoted to the this chapter, within five (5) business days of its receipt. Rule filings shall contain the following:

(1) The text of all pending rules, notices of rulemaking hearings, withdrawal of rules, stays of effective dates, withdrawal of stays of effective dates, emergency rules, announcements, and proclamations. Such text shall remain on the web site until the filing becomes effective as provided by this chapter. After the effective date of the rule, the filing shall be archived on the web site;

(2) A table listing the citations of all rules filed that have pending effective dates, hearing dates, or some other action required by this chapter;

(3) A table listing all emergency rules in effect; and

(4) Any other notices or documents designated by law or by the secretary of state.

(b) The secretary of state shall compile on the secretary of state's web site an official compilation of rules all the effective rules and regulations of each agency. The secretary of state shall update agency rules on the effective date of any new amendment to existing rules or of any new rules. The secretary of state shall incorporate emergency rules within the appropriate agency's rules within two (2)

business days of their filing. The secretary of state shall revise the official compilation of rules upon the expiration of an emergency rule.

(c) The secretary of state may, in the secretary of state's discretion, omit from the register or the compilation rules, which, if published, would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed, electronic or processed form on application to the adopting agency, and if the register or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(d) The secretary of state shall make the register web site and the official rules and regulation web site available through the Internet without charge to the user.

SECTION 17. Tennessee Code Annotated, Section 4-5-221, is amended by deleting the section in its entirety and by substituting instead the following:

Section 4-5-221.

(a) With respect to the publication of the administrative code to be cited as the rules and regulations of the state of Tennessee, and with regard to the publication of the monthly administrative register to be cited as the Tennessee administrative register, the secretary of state shall have the powers set out in subdivision (a)(1); provided, that the requirements of subdivision (a)(2) are met:

(1) In preparing the administrative code and administrative register the secretary of state shall not alter the sense, meaning or effect of any rule promulgated by an agency, but shall copy the exact language of the text of a rule filed with the secretary of state's office, except that the secretary of state is authorized to rearrange, regroup, and renumber the divisions, chapters, rules, and parts of rules for publication in the administrative code and monthly register and to change reference numbers to agree with any renumbered chapter or rule, to change the

wording of and prepare new rule headings and symbols; to substitute the proper rule or chapter reference where the terms "these rules" or "this regulation" or similar expressions are used in the rules; to correct manifest misspelling and typographical errors and to change capitalization and spelling for the purpose of uniformity; to change references to governmental agencies, when part or all of the powers, rights or duties of such agencies have, by act of the general assembly or of the governor, been transferred to other agencies; and to omit preambles, captions and statements declaring authority and rulemaking intent. Where the application or effect of a rule, by its terms, depends on the time when the rule took effect, the secretary of state may substitute the actual effective date for the various forms of expression that mean that date, such as "when this rule (or chapter) takes effect" or "after (or before) the effective date of this rule (or chapter)." No such change shall be deemed an alteration or departure from the rule as filed.

(2) Every agency filing rules for publication in the administrative code and administrative register shall assure the accuracy of its submission and that the submission meets the requirements of the rules and regulations promulgated by the secretary of state pursuant to this chapter, when they are filed with the secretary of state.

(b) The secretary of state shall prepare a written certificate of approval for each web site that certifies approval of the web site and its contents and that the text of each rule was compared with the original filing with the secretary of state, and that, with the exception of changes in form permitted by subsection (a), the rules are accurately and correctly copied.

(c) The web site of the administrative register and administrative code and its contents that contain the secretary of state's certificate of approval shall constitute prima

facie evidence of the regulatory law of the state of Tennessee and be received, recognized, referred to and used in all courts, agencies, departments, offices of and proceedings in Tennessee and the official compilation of rules and regulations of Tennessee.

(d) The secretary of state is authorized to delegate any or all duties and powers set out in this section and chapter to the director of the publications division or any other members of the secretary of state's staff.

SECTION 18. Tennessee Code Annotated, Section 4-5-224(a), is amended by deleting subdivision (1) in its entirety and by substituting instead the following

(1) Submit electronically to the secretary of state the hearing for publication in the notice section of the administrative register web site and, if a statute applicable to the specific agency or a specific rule or class of rules under consideration requires some other form of publication, publish notice as required by that statute in addition to publication in the notice section of the administrative register web site; and

SECTION 19. Tennessee Code Annotated, Section 4-5-224(c), is amended by deleting the word "promulgated" and by substituting instead the language "filed with the secretary of state".

SECTION 20. Tennessee Code Annotated, Section 4-5-226, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-226.

(a) Notwithstanding any other law to the contrary, unless legislation is enacted to continue a rule to a date certain or indefinitely, any permanent rule filed in the office of the secretary of state shall expire on June 30 of the year following the year of its filing.

(b)

(1) Notwithstanding any other law to the contrary, unless legislation is enacted to continue a rule to a date certain or to a date indefinitely beyond the date upon which an agency terminates, each permanent rule that does not expire under subsection (a), shall expire on the day provided in chapter 29, part 2 of this title for termination of the agency that promulgated such rule; provided, that if such agency continues in existence pursuant to § 4-29-112, such agency rule shall expire upon completion of such wind-up period.

(2) All rules and regulations issued or promulgated by any department or agency of state government whose functions, duties, or responsibilities have been transferred to another department or agency shall remain in full force and effect, and shall thereafter be administered and enforced by the agency or department assuming responsibility for those functions, duties, or responsibilities as rules of that agency or department, and all proposed rules pending with the attorney general and reporter or secretary of state, unless withdrawn, shall continue that status as proposed rules until becoming effective as rules of the agency assuming the functions, duties, or responsibilities. The agency or department assuming responsibility for such functions, duties, or responsibilities shall have the authority to promulgate new rules and regulations pursuant to this chapter to effectuate its duties and responsibilities. To this end, the department or agency shall have the authority, consistent with the statutes and regulations pertaining to the programs and functions transferred, to modify or rescind orders, rules and regulations, decisions or policies heretofore issued and to adopt, issue or promulgate new orders, rules and regulations, decisions or policies as may be necessary for the administration of the programs or functions transferred.

(c) Rules promulgated pursuant to this chapter may be reviewed by the government operations committees of the senate and house of representatives meeting jointly or separately; or, alternatively, at the discretion of the chair of either of such committees, such rule may be reviewed by a subcommittee of the government operations committees.

Members of the government operations committees of the senate and house of representatives shall serve as members of such committees until their successors are duly appointed; provided such members remain members of the general assembly. Any member of either government operations committee who ceases to be a member of the general assembly shall cease to be a member of the government operations committee on the same date such member's membership in the general assembly ceases, as provided in the Constitution of Tennessee. In the event a majority of the membership of either government operations committee shall cease to be members of the general assembly, the speaker of the senate or the speaker of the house of representatives, as the case may be, may designate an appropriate number of members to serve interim appointments until the government operations committee is reconstituted.

(d) In conducting the review required by subsection (c), the committees or subcommittees shall hold at least one (1) public hearing to receive testimony from the public and from the administrative head of the agency. At such hearing, the agency shall have the burden of demonstrating that consideration of the factors enumerated in subsection (e) justifies the continued existence of an agency rule. Notice of the time and place of the public hearing shall be on the general assembly web site prior to the hearing. To the extent reasonably practicable, the committees or subcommittees shall conduct hearings on newly filed rules, other than emergency rules, during the seventy-five day period immediately following the filing of the original of such rule in the office of the secretary of state.

(e) In conducting the review of agency rules, the committees or subcommittees shall consider the following factors:

- (1) Authority;
- (2) Clarity;
- (3) Consistency;

(4) Justification;

(5) Necessity, which shall include the need for a regulation where no regulations presently apply; and

(6) Reference.

(f) As used in subsection (e):

(1) "Authority" means provisions of law that permit or obligates the agency to adopt, amend or repeal a regulation;

(2) "Clarity" means the grammatical and structural soundness of a rule that tends to ensure that the rule will be easily understood by those persons directly affected by such rule;

(3) "Consistency" means the quality of being in harmony with, and not in conflict with or contradictory to, existing provisions of laws;

(4) "Justification" refers to the diligent, knowledgeable, zealous and timely efforts of the agency proposing continuation of a rule to produce all pertinent and relevant documents, records, written and verbal comments, and other items of information needed to justify continuation of the rule to the committee;

(5) "Necessity" means the need for and usefulness of a regulation as dictated by public policy considerations; and

(6) "Reference" means the statute, court decision or other provision of law that the agency implements, interprets or makes specific by adopting, amending or repealing a regulation.

(g) Nothing contained in this chapter shall be construed to prohibit the general assembly by legislative enactment from directly or indirectly repealing or amending any rule.

(h) The committee or subcommittee has the authority to hold hearings, subpoena records, documents and persons, and to exercise all powers otherwise vested upon

committees of the general assembly by title 3, chapter 3, and by the rules of the appropriate house.

(i)

(1) All agencies, upon filing a rule in the office of the secretary of state, shall also submit the following information:

(A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

(B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

(C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

(D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

(E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

(F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

(G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

(H) Office address and telephone number of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

(2) The secretary of state shall refuse to accept the filing of any rule that fails to comply with this subsection (i).

(j)

(1) The committee may express its disapproval of a rule that fails to satisfy any or all of the factors enumerated in subsection (e), by voting to allow such rule to expire upon its established expiration date or by voting to request the agency to repeal, amend or withdraw this rule before such established expiration date. Notice of the committee's disapproval of a rule whether by vote to allow the rule to expire or by vote to request the agency to repeal, amend or withdraw a rule shall be posted on the administrative register web site as soon as possible after the committee meeting in which such action was taken.

(2) In the event an agency fails to comply with the committee's request to repeal, amend or withdraw a rule within a reasonable time and before the established expiration date, the committee may vote to request the general assembly to suspend any or all of such agency's rulemaking authority for any reasonable period of time or with respect to any particular subject matter, by legislative enactment.

(k) In addition to the grounds stated in subdivision (j) it shall also be grounds for the government operations committee to recommend to the general assembly to terminate a rule promulgated under authority of any provision of title 68, chapters 201-221, or title 69, chapter 3, that imposes environmental requirements or restrictions on municipalities or counties that are more stringent than federal statutes or rules on the same subject, and that result in increased expenditure requirements on municipalities or counties beyond those

required to meet the federal requirements, unless the general assembly has appropriated funds to the affected local government or governments to cover the increased expenditures, in addition to those they receive pursuant to other laws; provided, a timely comment was addressed to the promulgating authority pursuant to § 4-5-204, raising this issue and specifying the level of increased expenditure mandated by the rule.

(l) If, pursuant to this section, the general assembly terminates a rule amending a previously existing rule, then such previously existing rule shall continue in effect until it is later amended, repealed or superseded by law.

(m) If, pursuant to this chapter, an agency withdraws a rule amending a previously existing rule, then such previously existing rule shall continue in effect until it is later amended, repealed or superseded by law.

SECTION 21. Tennessee Code Annotated, Section 4-5-227, is amended by deleting such section in its entirety and by substituting instead the following:

Section 4-5-227. Upon filing a rule with the secretary of state, an agency may designate a date on which the effectiveness of such rule will automatically terminate. Such a designation shall be made either within the substantive language of the rule or on a form provided for such purpose by the secretary of state and shall result, at the appropriate time, in the repeal and removal of such rule from the Official Compilation of Rules and Regulations of the State of Tennessee, published by the secretary of state, without any further rulemaking activity by the agency. Any rule that automatically expires under § 4-5-226, shall so expire pursuant to that section, notwithstanding the fact that the rulemaking agency may have designated a later date for the automatic termination of such rule under this section. This section shall not apply to emergency rules.

SECTION 22. This act shall take effect July 1, 2009, the public welfare requiring it and shall apply to all rules and regulations filed with the secretary of state after such date.