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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
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Legislative Budget  
Office

S.B. 1  
133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by House State and Local Government

**Primary Sponsors:** Sens. McColley and Roegner

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CORRECTED VERSION\*

## SUMMARY

### Department of Health orders and rules

- Specifies that all orders issued by the Director of Health on or after April 29, 2020, cease to be effective 14 days after the bill takes effect, unless the Joint Committee on Agency Rule Review (JCARR) approves extensions of those orders by a specified vote.
- Prohibits any future order of the Director of Health from being effective for more than 14 days unless, at the Director's request, JCARR approves an extension by that same vote.
- Specifies that the Director may make public health rules to prevent the spread of disease only in accordance with the Administrative Procedure Act, and prohibits the Director from making emergency rules, rule amendments, or rescissions under the Act.
- Gives any Ohio citizen standing to seek a court order that the Director comply with the bill's requirements, and specifies that the citizen is not required to prove that irreparable harm will result if the court does not issue the order.

### Reduction in regulatory restrictions

- Requires each state agency to reduce the regulatory restrictions contained in its rules by 30% by 2022, according to a schedule and criteria set forth in the bill.
- Prohibits an agency from adopting new regulatory restrictions that would increase the percentage of restrictions in the agency's rules.

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\* Corrects the discussion regarding the base inventory of regulatory restrictions.

- Beginning July 1, 2023, requires an agency that does not achieve a reduction in regulatory restrictions according to the required schedule to eliminate two restrictions before enacting a new rule containing a restriction.
- Allows JCARR to lessen an agency's required reduction in regulatory restrictions if the agency fails to meet a reduction goal and shows cause why the agency's required reduction should be lessened.
- Effective January 1, 2023, limits the total number of regulatory restrictions that may be in effect in Ohio.
- Lists the criteria an agency must use to determine whether a rule containing a regulatory restriction should be amended or rescinded.
- Requires an agency to produce a revised inventory and historical progress report before March 15, 2021, and annually thereafter until the agency has met its reduction goal.
- Allows an administrative department head to direct otherwise independent officials or state agencies organized under the department to reduce regulatory restrictions.
- Allows the Common Sense Initiative Office (CSIO) to review any rules containing regulatory restrictions that an agency is required to include in its inventory and to direct an agency to eliminate a regulatory restriction, and permits the agency to appeal that decision to JCARR.
- Directs JCARR to compile the agencies' inventories and reports into an annual comprehensive inventory and progress report that includes a description of JCARR's work over the past year in assisting agencies.
- Requires JCARR to consult with Legislative Information Systems (LIS) to create and maintain a system for agencies to enter regulatory restriction data and create, compile, and send inventories and reports.
- Requires JCARR to consult with LIS to establish, maintain, and improve the Cut Red Tape System, which must include a website and must allow members of the public to request information about regulatory restrictions and to communicate with JCARR about regulatory restrictions.

### **Continuing rule review process**

- Changes the criteria that all agencies must use when conducting a five-year review of an existing rule to match the bill's criteria for elimination of regulatory restrictions.
- Requires JCARR to apply the same modified standards when reviewing an existing rule that an agency has decided not to change, and also allows JCARR to recommend that the General Assembly invalidate a rule if the agency has failed to justify the retention of a rule containing a regulatory restriction.

- Allows JCARR to recommend that the General Assembly invalidate a proposed rule on the basis that the agency has failed to justify the proposed adoption, amendment, or rescission of a rule containing a regulatory restriction.

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## DETAILED ANALYSIS

### Department of Health orders and rules

#### Current orders

The bill specifies that all orders issued by the Director of Health on or after April 29, 2020, cease to be effective 14 days after the bill takes effect, unless the Joint Committee on

Agency Rule Review (JCARR) approves extensions of those orders by a majority vote that includes at least three members of the House of Representatives and three members of the Senate.<sup>1</sup>

Since April 29, the Director has issued two orders in response to the COVID-19 pandemic: one that extends the closure of all K-12 schools in Ohio through June 30, 2020,<sup>2</sup> and one that modifies the previous stay at home order and allows some businesses to reopen.<sup>3</sup> Under the bill, those orders cease to be effective 14 days after the bill takes effect, unless JCARR approves extensions.

### **Future orders and rules**

The bill prohibits any future order of the Director of Health from being effective for more than 14 days unless, at the Director's request, JCARR approves an extension by a majority vote that includes at least three members of the House of Representatives and three members of the Senate. JCARR must determine the period of the extension, if any.

For purposes of the bill, an order is considered to be effective for more than 14 days if the order includes an effective period that exceeds 14 days or if the substance of the order is contained in multiple subsequently issued orders whose combined effective period exceeds 14 days. (For example, the Director could not bypass the bill's restriction by issuing a series of orders with the same substance that each last only 14 days.)

The bill also specifies that the Director may make public health rules to prevent the spread of disease (as opposed to orders, governed by the provisions described above) only in accordance with the Administrative Procedure Act, which involves the JCARR rule review process. And, the Director may not make emergency rules, rule amendments, or rescissions under the Act, which generally allows agencies to change rules on an emergency basis without going through the typical rulemaking procedure.<sup>4</sup>

### **Enforcement**

Under the bill, any Ohio citizen has standing to seek a court order that the Director of Health comply with the bill's requirements. The citizen is not required to prove that irreparable harm will result if the court does not issue the order.

In general, a person who asks a court for a preliminary injunction against a government agency (an order that the agency take an action or refrain from taking an action, issued before the court makes a final decision in the case) must show that the person has standing, meaning that the person is actually injured by the agency's actions. And, the person must show that

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<sup>1</sup> Section 3 of the bill.

<sup>2</sup> ["Second Amended Order the Closure of All K-12 Schools in the State of Ohio,"](#) issued April 29, 2020.

<sup>3</sup> ["Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order,"](#) issued April 30, 2020.

<sup>4</sup> R.C. 101.35, 101.36, and 3701.13.

irreparable harm will result if the court does not grant the injunction. The bill allows an Ohio citizen to seek an injunction against the Director of Health without meeting those requirements.<sup>5</sup>

## **Reduction in regulatory restrictions**

### **Reduction goals**

#### **Three-year reduction of 30%**

The bill requires each state agency to reduce the number of regulatory restrictions in the agency's rules by 30% by amending or rescinding rules that contain regulatory restrictions according to criteria listed in the bill. The 30% reduction is based on the number of regulatory restrictions identified in a base inventory previously conducted by the agency under continuing law. The bill directs each agency to achieve a 10% reduction in regulatory restrictions before December 31, 2020; a 20% reduction before December 31, 2021; and the 30% reduction before December 31, 2022.

After an agency has achieved a reduction in regulatory restrictions, it cannot adopt additional regulatory restrictions that would cancel out the reduction. The agency also is encouraged to continue to reduce regulatory restrictions after the 30% reduction has been achieved.

If an agency does not achieve the required reduction in regulatory restrictions according to the bill's schedule, the bill prohibits the agency from adopting any new regulatory restriction unless it simultaneously removes two or more existing regulatory restrictions, beginning July 1, 2023. This prohibition remains in effect until the agency achieves the required reduction in regulatory restrictions. The agency also is barred from merging two existing regulatory restrictions into a single restriction in order to attempt to reduce the overall number of restrictions.<sup>6</sup>

#### **Lessened required reduction**

If an agency fails to meet a reduction goal listed above within 120 days of the deadline, the bill requires the Joint Committee on Agency Rule Review (JCARR) to give the agency an opportunity to appear to show cause why the agency's required reduction should be lessened. If JCARR determines that the agency has shown cause, JCARR must determine a lessened required reduction for that agency and must submit a written report to the Speaker of the House and the President of the Senate, indicating the lessened required reduction in regulatory restrictions for that agency and the reason JCARR determined that lessened reduction.<sup>7</sup>

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<sup>5</sup> R.C. 101.36(C).

<sup>6</sup> R.C. 121.951. Current law contains a blanket prohibition through June 30, 2023, against state agencies adopting a new regulatory restriction unless the agency simultaneously removes two or more other existing regulatory restrictions. R.C. 121.95(F).

<sup>7</sup> R.C. 121.952.

## Statewide cap on regulatory restrictions

Effective January 1, 2023, the total number of regulatory restrictions that may be effective at any one time in Ohio is capped at a number determined by JCARR. JCARR must determine that number by calculating, for each agency, the number of regulatory restrictions identified by the agency in its base inventory, minus the number of regulatory restrictions that represents the percentage reduction the agency is required to achieve not later than January 1, 2023 (30%, unless JCARR has lessened that percentage for the agency as described above), and then totaling the resulting numbers for all state agencies. An agency must contact JCARR before adopting a rule containing a regulatory restriction, and if JCARR determines that the state has reached the cap of regulatory restrictions, the agency may not adopt the restriction. No agency may adopt a regulatory restriction if that restriction would cause the state to exceed the cap on restrictions.<sup>8</sup>

### Covered agencies

Under continuing law and the bill, “state agency” means an administrative department created under R.C. 121.02; an administrative department head appointed under R.C. 121.03, (essentially all cabinet-level departments); or a state agency organized under an administrative department or administrative department head. The term also includes the Department of Education, the State Lottery Commission, the Ohio Casino Control Commission, the State Racing Commission, and the Public Utilities Commission of Ohio.

Rules adopted by an otherwise independent official or entity organized under an agency are attributed to the parent agency. This means that a parent agency must include rules containing regulatory restrictions adopted by those otherwise independent officials or entities as part of its total number of regulatory restrictions. Each state agency is required to reduce its overall regulatory restrictions by 30%, but each otherwise independent official or entity organized under the agency is not required to achieve a 30% reduction so long as the parent agency overall achieves the goal.

Certain state boards that must continue to conduct five-year reviews of their rules, and are subject to JCARR review of their rules, are not included in the definition of “state agency,” and therefore are not required to reduce their regulatory restrictions by 30% under the bill. However, as discussed below, the bill still adds to the factors those boards must consider during a rule’s five-year review and when adopting a new rule (see “**Continuing rule review process**,” below). It appears that the following entities would not be considered “state agencies” under current law regarding the base inventory or under the bill, but are subject to the continuing rule review process:<sup>9</sup>

- The Accountancy Board;
- The Architects Board and the Ohio Landscape Architects Board;

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<sup>8</sup> R.C. 121.953.

<sup>9</sup> R.C. 121.95(A).

- The Ohio Athletic Commission;
- The Chemical Dependency Professionals Board;
- The Chiropractic Board;
- The Cosmetology and Barber Board;
- The Counselor, Social Worker, and Marriage and Family Therapist Board;
- The State Dental Board;
- The Board of Embalmers and Funeral Directors;
- The State Medical Board;
- The Motor Vehicle Repair Board;
- The Board of Nursing;
- The Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board;
- The State Board of Pharmacy;
- The State Board of Registration for Professional Engineers and Surveyors;
- The State Board of Psychology;
- The State Speech and Hearing Professionals Board;
- The State Vision Professionals Board;
- The State Veterinary Medical Licensing Board.

### **Covered regulatory restrictions**

Under current law and for purposes of the bill, a “regulatory restriction” requires or prohibits an action. Rules that include the words “shall,” “must,” “require,” “shall not,” “may not,” and “prohibit” are considered to contain regulatory restrictions.

However, the following types of rules or regulatory restrictions are not required to be included in a state agency’s inventory of regulatory restrictions:<sup>10</sup>

- An internal management rule;
- An emergency rule;
- A rule that state or federal law requires the agency to adopt verbatim;
- A regulatory restriction contained in materials or documents incorporated by reference into a rule;
- Access rules for confidential personal information;

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<sup>10</sup> R.C. 121.95(B) and (E).

- A rule concerning instant lottery games;
- Any other rule that is not subject to review by JCARR.

### **Criteria for elimination**

The bill requires a state agency to review its base inventory of rules containing regulatory restrictions to determine whether each rule should be amended or rescinded because it does any of the following, or otherwise for the purpose of reducing regulatory restrictions:<sup>11</sup>

- Exceeds or conflicts with the purpose, scope, or intent of the statute under which the rule was adopted;
- Provides inadequate flexibility at the local level;
- Creates a compliance or oversight burden for the agency, or for any person or entity, that is greater than the burden that would be created if the agency accomplished the intended purpose of the restriction by other means;
- Is no longer useful or beneficial;
- Improperly incorporates a text or other material by reference, based on continuing-law standards;
- Duplicates, overlaps with, or conflicts with another state or federal law or rule. A rule duplicates, overlaps with, or conflicts with another law or rule if it imposes a duty or liability on a person or entity that the other law or rule also imposes on that person or entity, in whole or in part, or imposes a duty or liability that may require a person or entity to violate the other law or rule in whole or in part. If the rule duplicates, overlaps with, or conflicts with a rule adopted by another state agency, the bill requires the two agencies to determine which agency must amend or rescind its rule and to develop and execute a plan to work together to achieve the required oversight.
- Has an adverse impact on businesses, as determined under the continuing-law factors the Common Sense Initiative Office must apply when reviewing rules;
- Has an adverse impact on any other person or entity;
- Contains words or phrases whose meanings, in contemporary usage, are understood as being derogatory or offensive;
- Requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure;
- Imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal.

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<sup>11</sup> R.C. 106.03(A) and 121.951(A).



## Agency implementation

### Inventory of regulatory restrictions

Each agency to which the bill applies was required under continuing law, before December 31, 2019, to review its existing rules, prepare a base inventory of regulatory restrictions (see “**Covered regulatory restrictions**,” above), and determine the number of those restrictions. In the base inventory, the agency was required to provide all of the following information concerning each regulatory restriction:

- A description of the regulatory restriction;
- The rule in which the restriction appears;
- The statute under which the restriction was adopted;
- Whether state or federal law expressly and specifically requires the agency to adopt the regulatory restriction or the agency adopted it under the agency’s general authority;
- Whether removing the restriction would require a change to state or federal law, provided that removing a regulatory restriction adopted under a law granting the agency general authority is presumed not to require a change to state or federal law;
- Any other information JCARR considers necessary.

After completing the inventory, the agency was required to post it on its website and send a copy to JCARR, which was required to review the inventory and send it to the Speaker of the House and the President of the Senate.<sup>12</sup>

### Progress report and revised inventory

Under the bill, not later than March 15, 2021, each agency must prepare an updated inventory and historical report of its progress in achieving its regulatory reduction goal according to the bill’s schedule. In the report, the agency must explain how it applied the criteria described above under “**Criteria for elimination**” and must calculate its percentage reduction in regulatory restrictions by subtracting the current number of restrictions from the number of restrictions identified in the original inventory and dividing that result by the number of restrictions in the original inventory.

For example, if an agency identified ten restrictions in its original inventory and since then has added two new restrictions and eliminated four restrictions, the agency would have eight current restrictions. Ten original restrictions minus eight current restrictions equals a reduction of two restrictions. Two restrictions divided by ten original restrictions equals 0.2, or 20%. Therefore, the agency has achieved a 20% net reduction in restrictions.

The agency must produce a new revised inventory and historical report by March 15 of each year until the agency has achieved the required reduction in regulatory restrictions. The

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<sup>12</sup> R.C. 121.95(B), (C), and (D). See also R.C. 101.68, not in the bill.

agency must send its completed reports electronically to JCARR, which must review them and send them to the Speaker of the House and the President of the Senate.<sup>13</sup>

### **Administrative department head authority**

The bill authorizes the head of an administrative department created under R.C. 121.02 or an administrative department head appointed under R.C. 121.03 to direct otherwise independent officials or state agencies organized under the department to reduce regulatory restrictions in accordance with the bill.<sup>14</sup>

### **Common Sense Initiative Office**

The bill also allows the Common Sense Initiative Office (CSIO) to review any rules containing regulatory restrictions that a state agency is required to include in its inventory of regulatory restrictions, either in the course of evaluating draft rules and business impact analyses under continuing law or at any other time.

If CSIO determines, based on the bill's criteria for eliminating regulatory restrictions, that an agency should eliminate a regulatory restriction, the bill requires CSIO to notify the agency that it is required to eliminate that regulatory restriction, and the agency must eliminate it. If the agency objects to the elimination of the regulatory restriction, the bill allows the agency to appeal CSIO's decision to JCARR. If JCARR also determines, based on the criteria for elimination, that the agency should eliminate the regulatory restriction, the agency must eliminate it.<sup>15</sup>

### **Joint Committee on Agency Rule Review administration**

#### **Assistance to agencies and annual report**

The bill directs JCARR to advise and assist agencies in preparing their inventories of regulatory restrictions and in achieving the bill's reduction goals. Beginning in 2020, by June 15 of each year, JCARR must aggregate all the agencies' inventories and historical progress reports into an annual report that shows the agencies' overall progress in reducing regulatory restrictions. The annual report also must describe JCARR's work over the previous year and provide any appropriate recommendations for changes to statutes that contribute to the adoption of regulatory restrictions. JCARR must post the annual report on its website, send it to the Speaker of the House and the President of the Senate, and provide it to the members of JCARR.<sup>16</sup>

#### **Database**

The bill requires JCARR to consult with Legislative Information Systems (LIS) to create and maintain a system for state agencies to use to enter regulatory restriction data, create

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<sup>13</sup> R.C. 121.951(B).

<sup>14</sup> R.C. 121.031.

<sup>15</sup> R.C. 107.57.

<sup>16</sup> R.C. 101.354.

required inventories, and send copies of inventories, reports, and other documents that will assist JCARR in aggregating reports under the bill.<sup>17</sup>

### **Cut Red Tape System**

Under the bill, JCARR also must consult with LIS to establish, maintain, and improve the Cut Red Tape System, which must include a website and must allow members of the public to request information about regulatory restrictions and to communicate with JCARR about regulatory restrictions.<sup>18</sup>

## **Continuing rule review process**

### **Five-year review of existing rules**

#### **Agency review**

Under continuing law, a state agency must review each of its existing rules every five years to determine whether to amend or rescind them, based on listed criteria. The bill changes those criteria to match the criteria for elimination of regulatory restrictions (see “**Criteria for elimination**,” above), both for rules that are subject to the bill’s requirement to eliminate regulatory restrictions and for all other rules that are subject to the five-year review, including rules adopted by agencies that are not covered by the bill’s requirements concerning regulatory restrictions (see the independent boards listed above under “**Covered agencies**”). The bill alters the criteria by doing all of the following:

- Removing a requirement to consider whether a rule needs amendment or rescission to eliminate unnecessary paperwork;
- Adding requirements that the agency consider whether the rule should be amended or rescinded because it does any of the following, or otherwise for the purpose of reducing regulatory restrictions:
  - Creates a compliance or oversight burden for the agency, or for any person or entity, that is greater than the burden that would be created if the agency accomplished the intended purpose of the restriction by other means;
  - Is no longer useful or beneficial;
  - Duplicates, overlaps with, or conflicts with a state or federal law. The bill specifies that a rule duplicates, overlaps with, or conflicts with another law or rule if it imposes a duty or liability on a person or entity that the other law or rule also imposes on that person or entity, in whole or in part, or imposes a duty or liability that may require a person or entity to violate the other law or rule in whole or in part. If the rule duplicates, overlaps with, or conflicts with a rule adopted by another state agency, the bill requires the two agencies to determine which agency must

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<sup>17</sup> R.C. 101.355(A).

<sup>18</sup> R.C. 101.355(B).

- amend or rescind its rule and to develop and execute a plan to work together to achieve the required oversight.
- Has an adverse impact on any person or entity;
  - Imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal.

Under continuing law, an agency must evaluate whether a rule should be amended or rescinded because it does any of the following:

- Exceeds or conflicts with the purpose, scope, or intent of the statute under which the rule was adopted;
- Provides inadequate flexibility at the local level;
- Improperly incorporates a text or other material by reference;
- Duplicates, overlaps with, or conflicts with other rules;
- Has an adverse impact on businesses, as determined by CSIO;
- Contains words or phrases whose meanings, in contemporary usage, are understood as being derogatory or offensive;
- Requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

Because the bill makes the five-year review criteria match the criteria for eliminating regulatory restrictions, an agency that reviews all of its regulatory restrictions over the course of three years under the bill will already have completed the required five-year review for those rules.<sup>19</sup>

### **JCARR review**

If the state agency conducts a five-year rule review and determines that the rule should not be changed, continuing law requires JCARR to review that decision and allows JCARR to recommend that the General Assembly invalidate the rule if JCARR disagrees with the agency's assessment of the rule. Under the bill, JCARR must apply the same modified standards discussed above when reviewing an existing rule, and the bill also allows JCARR to recommend invalidation if the agency has failed to justify the retention of a rule containing a regulatory restriction.<sup>20</sup>

### **Review of proposed rules**

Under continuing law, when a state agency adopts a new rule, it also must file the proposed rule with JCARR for review, and JCARR may recommend that the General Assembly

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<sup>19</sup> R.C. 106.03.

<sup>20</sup> R.C. 106.031.

adopt a concurrent resolution to invalidate the rule if JCARR makes certain findings. The bill expands the permitted reasons for JCARR to recommend the invalidation of a proposed rule to include the basis that the agency has failed to justify the proposed adoption, amendment, or rescission of a rule containing a regulatory restriction.<sup>21</sup>

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## HISTORY

Action	Date
Introduced	02-12-19
Reported, S. Gov't Oversight & Reform	05-08-19
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Reported, H. State & Local Gov't	05-06-20

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<sup>21</sup> R.C. 106.021.