

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

### **Committee Substitute**

**for**

### **House Bill 4031**

BY DELEGATES FRICH, SOBONYA, HOWELL,  
MOFFATT, MCCUSKEY, SHOTT, OVERINGTON,  
MR. SPEAKER, MR. ARMSTEAD, ROWE AND  
FLEISCHAUER

[Originating in the Committee on Government  
Organization, January 18, 2016]



1 A BILL to amend and reenact §29A-3-5, §29A-3-6, and §29A-3-11 of the Code of West Virginia,  
2 1931, as amended, all relating to requiring agencies to respond to public comments  
3 received during the rule-making process; permitting the President of the Senate and the  
4 Speaker of the House of Delegates to review agencies' responses; providing grounds for  
5 the rejection of a proposed rule; and providing for review of agencies' responses by  
6 legislative rule-making review committee.

*Be it enacted by the Legislature of West Virginia:*

1 That §29A-3-5, §29A-3-6, and §29A-3-11 of the Code of West Virginia, 1931, as amended,  
2 be amended and reenacted, all to read as follows:

### **ARTICLE 3. RULE MAKING.**

#### **§29A-3-5. Notice of proposed rulemaking.**

1 When an agency proposes to promulgate a rule other than an emergency rule, it shall file  
2 with the Secretary of State, for publication in the State Register, a notice of its action, including  
3 therein any request for the submission of evidence to be presented on any factual determinations  
4 or inquiries required by law to promulgate such rule. At the time of filing the notice of its action,  
5 the agency shall also file with the Secretary of State a copy of the full text of the rule proposed,  
6 and a fiscal note as defined in subsection (b), section four of this article. If the agency is  
7 considering alternative draft proposals, it may also file with the Secretary of State the full text of  
8 such draft proposals.

9 The notice shall fix a date, time and place for the receipt of public comment in the form of  
10 oral statements, written statements and documents bearing upon any findings and determinations  
11 which are a condition precedent to the final approval by the agency of the proposed rule, and  
12 shall contain a general description of the issues to be decided. If no specific findings and  
13 determinations are required as a condition precedent to the final approval by the agency of the  
14 approved rule, the notice shall fix a date, time and place for the receipt of general public comment  
15 on the proposed rule. To comply with the public comment provisions of this section, the agency

16 may hold a public hearing or schedule a public comment period for the receipt of written  
17 statements and documents, or both.

18         If findings and determinations are a condition precedent to the promulgation of such rule,  
19 then an opportunity for general public comment on the merits of the rule shall be afforded after  
20 such findings and determinations are made. In such event, notice of the hearing or of the period  
21 for receiving public comment on the proposed rule shall be attached to and filed as a part of the  
22 findings and determinations of the agency when filed in the State Register.

23         In any hearing for public comment on the merits of the rule, the agency may limit  
24 presentations to written material. The time, date and place fixed in the notice shall constitute the  
25 last opportunity to submit any written material relevant to any hearing, all of which may be earlier  
26 submitted by filing with the agency. After the public hearing or the close of the public comment  
27 period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider,  
28 any attempted ex parte communications directed to it in the form of additional comment, prior to  
29 the submission of its final agency-approved rule to the Legislative Rule-Making Review  
30 Committee pursuant to the provisions of section eleven of this article.

31         The agency may also, at its expense, cause to be published as a Class I legal publication  
32 in every county of the state any notice required by this section.

33         Any citizen or other interested party may appear and be heard at such hearings as are  
34 required by this section.

35         No sooner than five business days after the public hearing or the close of the public  
36 comment period, whichever is later, and prior to the submission of the proposed rule to the  
37 Secretary of State, the agency shall respond to public comments made during the rule-making  
38 process and explain why comments were incorporated or not incorporated into the rule. Failure  
39 to adequately respond to public comments shall be grounds for rejection of the proposed rule.

**§29A-3-6. Filing findings and determinations for rules in state register; evidence deemed public record.**

1 (a) Incident to fixing a date for public comment on a proposed rule, the agency shall  
2 promulgate the findings and determinations required as a condition precedent thereto, and state  
3 fully and succinctly the reasons therefor and file such findings and determinations in the state  
4 register. If the agency amends the proposed rule as a result of the evidence or comment  
5 presented pursuant to section five, such amendment shall be filed with a description of any  
6 changes and statement listed for the amendment.

7 (b) The statement of reasons and a transcript of all evidence and public comment received  
8 pursuant to notice are public records and shall be carefully preserved by the agency and be open  
9 for public inspection and copying for a period of not less than five years from the date of the  
10 hearing.

11 (c) The President of the Senate and the Speaker of the House of Delegates may review  
12 the proposed rule to determine if the agency adequately responded to the comments received  
13 during the public comment period. Should either one of them determine that the agency did not  
14 adequately respond to the comments received during the public comment period, they may reject  
15 the proposed rule and the proposed rule shall be returned to the agency until such time as the  
16 agency adequately responds to the comments received during the public comment period.

**§29A-3-11. Submission of legislative rules to the legislative rule-making review committee.**

1 (a) When an agency finally approves a proposed legislative rule for submission to the  
2 Legislature, pursuant to the provisions of section nine of this article, the secretary of the executive  
3 department which administers the agency pursuant to the provisions of article two, chapter five-f  
4 of this code shall submit to the legislative rule-making review committee at its offices or at a  
5 regular meeting of such committee fifteen copies of: (1) The full text of the legislative rule as finally  
6 approved by the agency, with new language underlined and with language to be deleted from any

7 existing rule stricken through but clearly legible; (2) a brief summary of the content of the  
8 legislative rule and a description and a copy of any existing rule which the agency proposes to  
9 amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note  
10 containing all information included in a fiscal note for either house of the Legislature and a  
11 statement of the economic impact of the rule on the state or its residents; (5) one copy of any  
12 relevant federal statutes or regulations; and (6) any other information which the committee may  
13 request or which may be required by law. If the agency is an agency, board or commission which  
14 is not administered by an executive department as provided for in article two, chapter five-f of this  
15 code, the agency shall submit the final agency-approved rule as required by this subsection.

16 (b) The committee shall review each proposed legislative rule and, in its discretion, may  
17 hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

18 (1) Whether the agency has exceeded the scope of its statutory authority in approving the  
19 proposed legislative rule;

20 (2) Whether the proposed legislative rule is in conformity with the legislative intent of the  
21 statute which the rule is intended to implement, extend, apply, interpret or make specific;

22 (3) Whether the proposed legislative rule conflicts with any other provision of this code or  
23 with any other rule adopted by the same or a different agency;

24 (4) Whether the proposed legislative rule is necessary to fully accomplish the objectives  
25 of the statute under which the rule was proposed for promulgation;

26 (5) Whether the proposed legislative rule is reasonable, especially as it affects the  
27 convenience of the general public or of persons particularly affected by it;

28 (6) Whether the proposed legislative rule could be made less complex or more readily  
29 understandable by the general public; and

30 (7) Whether the proposed legislative rule was proposed for promulgation in compliance  
31 with the requirements of section five of this article regarding the agency's response to public  
32 comments; and

33           ~~(7)~~(8) Whether the proposed legislative rule was proposed for promulgation in compliance  
34 with the requirements of this article and with any requirements imposed by any other provision of  
35 this code.

36           (c) After reviewing the legislative rule, the committee shall recommend that the  
37 Legislature:

38           (1) Authorize the promulgation of the legislative rule; or

39           (2) Authorize the promulgation of part of the legislative rule; or

40           (3) Authorize the promulgation of the legislative rule with certain amendments; or

41           (4) Recommend that the proposed rule be withdrawn.

42           The committee shall file notice of its action in the state register and with the agency  
43 proposing the rule: *Provided*, That when the committee makes the recommendations of  
44 subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons  
45 for such recommendation.

46           (d) When the committee recommends that a rule be authorized, in whole or in part, by the  
47 Legislature, the committee shall instruct its staff or the office of Legislative Services to draft a bill  
48 authorizing the promulgation of all or part of the legislative rule and incorporating such  
49 amendments as the committee desires. If the committee recommends that the rule not be  
50 authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together  
51 with a recommendation. Any draft bill prepared under this section shall contain a legislative finding  
52 that the rule is within the legislative intent of the statute which the rule is intended to implement,  
53 extend, apply or interpret and shall be available for any member of the Legislature to introduce to  
54 the Legislature.

NOTE: The purpose of this bill is to require agencies to respond to public comments received during the rule-making process.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.