

# **WEST VIRGINIA LEGISLATURE**

**2016 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 619**

BY SENATORS BLAIR, CARMICHAEL, CLINE, GAUNCH,

KARNES, MULLINS AND TRUMP, *original sponsors*

[Passed March 12, 2016; in effect 90 days from passage]



1 AN ACT to amend and reenact §29A-3-5 and §29A-3-11 of the Code of West Virginia, 1931, as  
2 amended; to amend said code by adding thereto two new sections, designated §29A-3-  
3 19 and §29A-3-20; and to amend said code by adding thereto a new section, designated  
4 §29A-3A-20, all relating generally to legislative rulemaking; requiring agencies to respond  
5 to public comments received during the rule-making process; requiring agencies to explain  
6 reason for comments being included or excluded from the rule; providing that failure of an  
7 agency to adequately explain why or why not public comments were incorporated into the  
8 rule may be grounds for rejection of the proposed rule; making changes to the procedures  
9 for the submission of a proposed legislative rule; allowing copies of proposed rule to be  
10 submitted in electronic or paper form at the request of the Legislative Rule-Making Review  
11 Committee; requiring additional information to be included when an agency submits  
12 proposed rules to the Legislative Rule-Making Review Committee; adding determinations  
13 the Legislative Rule-Making Review Committee shall make as part of its review of a  
14 proposed legislative rule; allowing the Legislative Rule-Making Review Committee to  
15 recommend rejection of the proposed legislative rule as one of the recommendations the  
16 Legislative Rule-Making Review Committee may make to the Legislature following its  
17 committee review; providing for a five-year sunset provision for all new legislative rules  
18 promulgated after April 1, 2016; requiring sunset provisions in all future modifications of  
19 existing legislative rules after April 1, 2016; allowing for renewal for an additional term of  
20 years; clarifying that statutory sunset provisions take precedence over sunset provisions  
21 in a rule; expressly exempting rules promulgated by the Department of Environmental  
22 Protection from the sunset requirement; expressly exempting emergency rules from the  
23 sunset requirement; providing that the existence of a sunset provision shall not preclude  
24 the repeal of the legislative rule prior to the expiration of the sunset provision; authorizing  
25 the Legislative Rule-Making Review Committee to establish a procedure for timely review  
26 of rules prior to the expiration of the sunset provision; requiring the Secretary of State to  
27 provide notice to agencies at least eighteen months prior to an agency's rule sunset date;

28 requiring executive agencies with rulemaking authority to submit a report to the Joint  
29 Committee on Government and Finance and to the Legislative Rule-Making Review  
30 Committee on or before November 1, 2017, indicating a description of state rules,  
31 guidelines, policies and recommendations that are more stringent than federal  
32 counterparts as well as public comments received relating to the same; requiring agencies  
33 with rulemaking authority to perform certain actions, evaluations, determinations and  
34 public comment period in preparation of the report; requiring each executive agency with  
35 rulemaking authority to review each of its rules, make certain determinations, within four  
36 years and submit a report to the Legislative Rule-Making Review Committee on or before  
37 July 1, 2020; setting forth the information to be included in the report to the Legislative  
38 Rule-Making Review Committee; requiring a five-year sunset provision for all new  
39 legislative rules promulgated after April 1, 2016, by the Higher Education Policy  
40 Commission or other higher education entity defined as a board under section one, article  
41 three-a, chapter twenty-nine-a of the code; requiring sunset provisions in all future  
42 modifications of existing legislative rules promulgated after April 1, 2016, by the Higher  
43 Education Policy Commission or other higher education entity defined as a board under  
44 section one, article three-a, chapter twenty-nine-a of the code; allowing for renewal for an  
45 additional term of years; clarifying that statutory sunset provisions take precedence over  
46 sunset provisions in a rule; expressly exempting emergency rules from the sunset  
47 requirement; providing that the existence of a sunset provision shall not preclude the  
48 repeal of the legislative rule prior to the expiration of the sunset provision; authorizing the  
49 Legislative Oversight Commission on Education Accountability to establish a procedure  
50 for timely review of rules prior to the expiration of the sunset provision; and requiring the  
51 Secretary of State to provide notice to the Higher Education Policy Commission or other  
52 higher education entity defined as a board under section one, article three-a, chapter  
53 twenty-nine-a of the code at least eighteen months prior to an agency's rule sunset date.

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

1           That §29A-3-5 and §29A-3-11 of the Code of West Virginia, 1931, as amended, be  
2 amended and reenacted; that said code be amended by adding thereto two new sections,  
3 designated §29A-3-19 and §29A-3-20; and that said code be amended by adding thereto a new  
4 section, designated §29A-3A-20, all to read as follows:

**ARTICLE 3. RULEMAKING.**

**§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 shall  
12 contain a general description of the issues to be decided. If no specific findings and determinations  
13 are required as a condition precedent to the final approval by the agency of the approved rule,  
14 the notice shall fix a date, time and place for the receipt of general public comment on the  
15 proposed rule. To comply with the public comment provisions of this section, the agency may hold  
16 a public hearing or schedule a public comment period for the receipt of written statements and  
17 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 Prior to the submission of any agency-approved proposed rule to the Secretary of State,  
36 the agency shall respond to public comments received during the rule-making process and  
37 explain the reasoning for comments being incorporated or not incorporated into the rule. Failure  
38 to adequately respond to public comments may be grounds for rejection of the proposed rule.

**§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 a number of copies in electronic or paper form as requested  
6 by the committee, which shall include the following information:

- 7 (1) The full text of the legislative rule as finally approved by the agency, with new language  
8 underlined and with language to be deleted from any existing rule stricken through but clearly  
9 legible;
- 10 (2) A brief summary of the content of the legislative rule and a description and a copy of  
11 any existing rule which the agency proposes to amend or repeal;
- 12 (3) A statement of the circumstances which require the rule;
- 13 (4) A detailed description of the rule's purpose and all proposed changes to the rule;
- 14 (5) A fiscal note containing all information included in a fiscal note for either house of the  
15 Legislature and a statement of the economic impact of the rule on the state or its residents;
- 16 (6) One copy of any relevant federal statutes or regulations;
- 17 (7) An explanation of the statutory authority for the rule, including a detailed summary of  
18 the effect of each provision of the rule with citation to the specific statute which empowers the  
19 agency to enact such provision;
- 20 (8) All public comments for each proposed rule. An agency may consolidate substantially  
21 similar comments in the interest of efficiency;
- 22 (9) All written responses by the agency to the substance of any public comments received,  
23 including whether the agency chose to modify the proposed rule in response to the comments or,  
24 if no changes were made, the rationale for declining to incorporate or make any suggested  
25 changes responding to the public comments. An agency may consolidate substantially similar  
26 responses in the interest of efficiency: *Provided*, That the agency's response shall address each  
27 issue and concern expressed by all comments received; and
- 28 (10) Any other information which the committee may request or which may be required  
29 by law. If the agency is an agency, board or commission which is not administered by an executive  
30 department as provided for in article two, chapter five-f of this code, the agency shall submit the  
31 final agency-approved rule as required by this subsection.

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

34 (1) Whether the agency has specific statutory authority to propose the rule and has not  
35 exceeded the scope of its statutory authority in approving the proposed legislative rule;

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

38 (3) Whether the proposed legislative rule overlaps, duplicates or conflicts with any other  
39 provision of this code, any other rule adopted by the same or a different agency, with federal  
40 statutes and rules, or with local laws and rules;

41 (4) Whether federal funding will be impacted by its expiration and explanation as to such;

42 (5) Whether the proposed legislative rule is necessary to fully accomplish the objectives  
43 of the statute under which the rule was proposed for promulgation;

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

46 (7) Whether the proposed legislative rule could be made less complex or more readily  
47 understandable by the general public; and

48 (8) Whether the proposed legislative rule was proposed for promulgation in compliance  
49 with the requirements of this article and with any requirements imposed by any other provision of  
50 this code.

51 (c) After reviewing the legislative rule, the committee shall recommend that the  
52 Legislature:

53 (1) Authorize the promulgation of the legislative rule;

54 (2) Authorize the promulgation of part of the legislative rule;

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

56 (4) Recommend that the proposed rule be withdrawn; or

57 (5) Reject the proposed rule.



58           The committee shall file notice of its action in the State Register and with the agency  
59 proposing the rule: *Provided*, That when the committee makes the recommendations of  
60 subdivision (2), (3), (4) or (5) of this subsection, the notice shall contain a statement of the reasons  
61 for such recommendation.

62           (d) When the committee recommends that a rule be authorized, in whole or in part, by the  
63 Legislature, the committee shall instruct its staff or the office of Legislative Services to draft a bill  
64 authorizing the promulgation of all or part of the legislative rule and incorporating such  
65 amendments as the committee desires. If the committee recommends that the rule not be  
66 authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together  
67 with a recommendation. Any draft bill prepared under this section shall contain a legislative finding  
68 that the rule is within the legislative intent of the statute which the rule is intended to implement,  
69 extend, apply or interpret and shall be available for any member of the Legislature to introduce to  
70 the Legislature.

**§29A-3-19. Sunset provision in rules.**

1           (a) Any new legislative rule promulgated pursuant to this article after April 1, 2016, shall  
2 include a sunset provision terminating the rule after five years: *Provided*, That the rule may be  
3 renewed for additional terms of five years or less by the Legislature pursuant to the rule-making  
4 procedures and authority in this article: *Provided, however*, That if a different sunset or termination  
5 provision exists in the statute under which the proposed rule is promulgated, the enabling statute's  
6 provision shall control: *Provided further*, That this subsection shall not apply to rules promulgated  
7 by the Department of Environmental Protection or emergency rules promulgated pursuant to  
8 section fifteen of this article.

9           (b) Any legislative rule existing as of April 1, 2016, that is thereafter modified pursuant to  
10 this article shall include a sunset provision as part of the modification setting forth a termination  
11 date for the rule: *Provided*, That the rule may be renewed for additional terms of years by the  
12 Legislature pursuant to the rule-making procedures and authority in this article: *Provided*,

13 *however*, That if a different sunset or termination provision exists in the statute under which the  
14 proposed rule is promulgated, the enabling statute's provision shall control: *Provided further*, That  
15 this subsection shall not apply to rules promulgated by the Department of Environmental  
16 Protection or emergency rules promulgated pursuant to section fifteen of this article.

17 (c) The existence of a sunset provision terminating a rule shall not preclude the repeal of  
18 such rule by the Legislature prior to the expiration of the sunset provision.

19 (d) As part of its rule review under this article, the Legislative Rule-Making Review  
20 Committee is authorized to establish a procedure for timely review of rules prior to the expiration  
21 for those agencies that have affirmatively sought renewal prior to expiration. The procedure may  
22 include a requirement that the agency show cause as to why the expiring rule is required and  
23 necessary to be continued for another term of years.

24 (e) The Secretary of State shall provide notice to the promulgating agency at least  
25 eighteen months prior to every rule's expiration date.

**§29A-3-20. Executive review of agency rules, guidelines, policies and recommendations.**

1 (a) All executive agencies with rule-making authority shall:

2 (1) Review and evaluate all state rules, guidelines, policies and recommendations under  
3 their jurisdiction that have similar federal rules, guidelines, policies and recommendations;

4 (2) Determine whether the state rules, guidelines, policies and recommendations are more  
5 stringent than federal counterparts;

6 (3) Provide for a comment period for all rules, guidelines, policies and recommendations;

7 and

8 (4) Submit a report to the Joint Committee on Government and Finance and the Legislative  
9 Rule-Making Review Committee on or before November 1, 2017, which shall include:

10 (A) A description of the state rules, guidelines, policies and recommendations that are  
11 more stringent than federal counterparts; and

12 (B) Comments received from the comment period provided for in subdivision (3) of this  
13 subsection.

14 (b) Within four years of the enactment of this law, each executive agency with rule-making  
15 authority shall review all of its rules and determine whether the rules should be continued without  
16 change, modified or repealed. On or before July 1, 2020, each agency shall submit a report to the  
17 Legislative Rule-Making Review Committee which includes the following information for each rule  
18 under the agency's jurisdiction:

19 (1) A description of the rule;

20 (2) A determination of whether the rule should continue without change, be modified or  
21 repealed; and

22 (3) The reasoning for said determination.

### **ARTICLE 3A. HIGHER EDUCATION RULEMAKING.**

#### **§29A-3A-20. Sunset provision in rules.**

1 (a) Any new legislative rule promulgated pursuant to this article after April 1, 2016, shall  
2 include a sunset provision terminating the rule after five years: *Provided*, That the rule may be  
3 renewed for additional terms of five years or less by the Legislature pursuant to the rule-making  
4 procedures and authority in this article: *Provided, however*, That if a different sunset or termination  
5 provision exists in the statute under which the proposed rule is promulgated, the enabling statute's  
6 provision shall control: *Provided further*, That this subsection shall not apply to emergency rules  
7 promulgated pursuant to section sixteen of this article.

8 (b) Any legislative rule existing as of April 1, 2016, that is thereafter modified pursuant to  
9 this article shall include a sunset provision as part of the modification setting forth a termination  
10 date for the rule: *Provided*, That the rule may be renewed for additional terms of years by the  
11 Legislature pursuant to the rule-making procedures and authority in this article: *Provided*,  
12 *however*, That if a different sunset or termination provision exists in the statute under which the  
13 proposed rule is promulgated, the enabling statute's provision shall control: *Provided further*, That

14 this subsection shall not apply to emergency rules promulgated pursuant to section sixteen of this  
15 article.

16 (c) The existence of a sunset provision terminating a rule shall not preclude the repeal of  
17 such rule by the Legislature prior to the expiration of the sunset provision.

18 (d) As part of its rule review under this article, the Legislative Oversight Commission on  
19 Education Accountability is authorized to establish a procedure for timely review of a rule prior to  
20 its expiration if the board has affirmatively sought renewal prior to expiration. The procedure may  
21 include a requirement that the board show cause as to why the expiring rule is required and  
22 necessary to be continued for another term of years.

23 (e) The Secretary of State shall provide notice to the board at least eighteen months prior  
24 to every rule's sunset date.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, Senate Committee*

.....  
*Chairman, House Committee*

Originated in the Senate.

In effect 90 days from passage.

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*Clerk of the Senate*

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*Clerk of the House of Delegates*

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*President of the Senate*

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*Speaker of the House of Delegates*

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The within ..... this the.....  
Day of ....., 2016.

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*Governor*