

MEMORANDUM



DATE: March 3, 2011
TO: Interested Parties
FROM: Mark Wolf, Fiscal Analyst
RE: Executive Orders 2011-4 and 2011-5

This memorandum reviews Executive Order 2011-4, which reorganizes the Department of Energy, Labor, and Economic Growth into the Department of Licensing and Regulatory Affairs (LARA)¹ and Executive Order 2011-5, which revises the administrative rule promulgation process. The FY 2012 Executive Budget Recommendation for DELEG was based on the current structure for the department. Given the compressed time frame planned for legislative action on the FY 2012 budget, it is anticipated that the State Budget Office will transmit a revised Executive Budget Recommendation soon.

As a general rule, the department retained and expanded its core focus of business and professional licensing and regulation and rid itself of certain workforce development functions. The executive order further consolidates the administrative hearings functions of the department. Governor Snyder also issued Executive Order 2011-5, establishing a new Office of Regulatory Reinvention and expanding the scope of review of existing and proposed rules by both ORR and the promulgating agency. The department's new mission will focus on four principal areas: (1) licensing and regulation; (2) the administrative hearings system; (3) employment services; and (4) the promulgation of administrative rules.

The State Constitution grants authority to the governor to "make changes in the organization of the executive branch or assignment of functions among its units which he [or she] considers necessary for efficient administration."² This authority, courts have noted, is nearly plenary and equal to that of the Legislature. "This power includes the authority to delegate, assign, or transfer existing power, responsibility, or authority within, among, or across not more than twenty principal departments. The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself."³

The constitution further provides that "[w]here these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor."

To Licensing and Regulatory Affairs:

EO 2011-4 moves authority for the licensing and regulation of health professions and health facilities back to DELEG/LARA. These programs were previously a part of the Department of Consumer and Industry Services (DCIS), but were moved to the Department of Community Health when DCIS reorganized into DELEG in 2003. Many states – including Wisconsin, Illinois, and Indiana – have a single department or agency that regulates and licenses both health professions and other general industry professions.

¹ LARA is pronounced "Laura". The executive orders are available at, <http://legislature.mi.gov/doc.aspx?ExecutiveOrders>.

² Article IV, Section 2.

³ *Strauss v. Governor*, 459 Mich 526 (1999). See also *Morris v. Governor*, 214 Mich App 604 (1995), "when the Governor acts under this constitutional provision by means of an executive order and that order is not overturned by the Legislature, it is as if the Legislature had acted."

1. DCH–Bureau of Health Professions

The Bureau of Health Professions is responsible for licensing and regulating more than 400,000 health professionals practicing more than 35 occupations. Administration of these licensing requirements is generally undertaken in conjunction with a licensing board comprising licensed health professionals and public members generally under the authority of Article 15 (Occupations) of the Public Health Code, 1978 PA 378. The bureau is divided into four divisions:

- a. Administration Division – The Administration Division is responsible for overall policy direction for the bureau, provides support for the Professional Practice Section and the Advocacy Committee on Pain and Symptom Management.
- b. Licensing Division – The Licensing Division is responsible for the license application and renewal process for all regulated professions and oversees the continuing education requirements. The division also approves educational programs for nurses and nurse aides and manages the long term care (LTC) background check process.
- c. Allegation and Investigation Division: The Investigation Division is responsible for investigating allegations of violations of the Public Health Code. The division also oversees the automated controlled substance prescription tracking system and inspections of pharmacies.
- d. Regulatory Division: The Regulatory Division is responsible for filing formal complaints against individuals based on the findings of the Investigation Division. The division ensures that disciplined professionals comply with the final decisions and sanctions issued by their licensing board. The division also oversees the meetings of the several licensing boards and the promulgation of administrative rules. The division also oversees the Health Professionals Recovery Program and the medical marijuana law.

2. DCH–Bureau of Health Systems

The Bureau of Health Systems is responsible for ensuring that regulated health facilities provide safe and effective health care services in a safe environment through licensing and regulating health care facilities and nursing homes, Certificate of Need approval, licensing and regulation radiation machines, and taking appropriate enforcement action (often in cooperation with the Centers of Medicare and Medicaid Services). The bureau is divided into four divisions:

- a. Division of Health Facilities and Services – The division reviews design plans and conducts on-site inspections, and issues construction permits to ensure construction meets the minimum design standards for health facilities. The division also conducts licensing and certification surveys of licensed health care facilities to identify and resolve operational, environmental, and infection control problems.
- b. Division of Licensing and Certification – The licensing division licenses and recommends CMS certification for health facilities (hospitals, hospices, etc.), except long-term care facilities. The division also licenses substance abuse prevention and treatment programs.
- c. Division of Nursing Home Monitoring – The nursing home division annually inspects nursing homes, county medical care facilities, and hospital long-term care units to ensure compliance with CMS requirements. The division conducts biennial inspections to ensure compliance with the nursing home requirements of the Public Health Code and related administrative rules.
- d. Division of Operations – The operations division processes complaints received against all BHS program areas and coordinate appropriate enforcement efforts. The division investigates complaints against nursing homes alleging failure to provide adequate or appropriate care and

allegations of abuse, neglect, mistreatment, or the misappropriation of property belonging to facility residents.

Reorganization of the SOAHR Administrative Hearings Functions

EO 2011-4 reorganizes the State Office of Administrative Hearings and Rules (SOAHR) by establishing a separate office providing central oversight over the administrative rule promulgation process for all state agencies, and by moving other administrative law hearings functions into the office. The agency is renamed the Michigan Administrative Hearing System.

Executive Order 2005-2 established centralized many of the administrative hearings functions scattered throughout the departments into a single office – SOAHR – headed by an executive director appointed by the Governor.⁴ SOAHR hearings officers (administrative law examiners) conduct contested case hearings, directed by the Administrative Procedures Act. With few exceptions, SOAHR hearings officers conduct hearings on behalf of every department. The office conducts about 150,000 hearings per year, with the bulk of those related to prisoner misconduct issues (from the Department of Corrections) and unemployment benefit claims disputes (from the Unemployment Agency). Other DELEG hearings include those for the Michigan Tax Tribunal, the Wage and Hour Division, the Public Service Commission, and the Bureau of Commercial Services (occupational licensing). The office also conducts a number of benefit eligibility hearings for the Department of Community Health and the Department of Human Services.

The executive order organizes a number of administrative hearings functions not transferred previously to SOAHR within the umbrella of the Michigan Administrative Hearings System.

1. Michigan Tax Tribunal

The Michigan Tax Tribunal is established as a Type 1 (independent) agency within DELEG.⁵ Currently, SOAHR hearings officers conduct hearings on behalf of the MTT (generally for the Small Claims Division). The FY 2010 SOAHR Performance Report notes that this number totaled 551 hearings. This authority for the MTT to utilize hearings officers is provided for in Section 26 of the Tax Tribunal Act. Hearings officers issued proposed opinions and orders. The actual final opinion and order is issued by a MTT member.

2. The Michigan Employment Security Board of Review.

The MES Board of Review is established in Section 35 of the Michigan Employment Security Act, Public Act 1 of 1936 (Extra Session), MCL 421.35, as a separate agency from the UIA. Under the MESA, an employer or a claimant who disagrees with a determination made by the UIA can request a redetermination. A redetermination can be appealed to an administrative law examiner (from SOAHR), with the decision of the ALE appealable to the MES Board of Review. Generally the MES Board of Review reviews questions of law, rather than reviewing evidence and hearing witnesses. In FY 2010, the board received 10,152 appeals, an increase of 67% from the number of appeals received in the prior year.

3. Workers Compensation Appellate Commission

The Workers Compensation Appellate Commission (WCAC) was originally established in the Workers Compensation Disability Act (1969 PA 317) through the enactment of Public Act 103 of 1985.⁶ The 5-member WCAC hears appeals of workers compensation claims decided by the Board of Magistrates, with

⁴ Executive Reorganization Order 2005-1, codified at MCL 445.2021. See, also, Peter L. Plummer, "The State Office of Administrative Hearings and Rules: The Centralization of Michigan's Administrative Law Hearings", *Michigan Bar Journal*, Vol. 85, No. 11 (November 2006), <http://www.michbar.org/journal/pdf/pdf4article1074.pdf>.

⁵ See Public Act 186 of 1973. The tribunal was transferred from the Department of Treasury to the Department of Commerce (eventually renamed DELEG) with Executive Reorganization Order 1991-15, MCL 205.800.

⁶ The WCAC was abolished and re-established with ERO 2003-1, MCL 445.2011.

parties permitted to appeal WCAC decisions to the Court of Appeals. A decade ago, the WCAC's annual caseload numbered about 600. Today, it numbers about 200. Under the FY 2012 Executive Budget Recommendation, the WCAC will be eliminated, resulting in a savings of about \$1.2 million.

In addition to transfer the WCAC to the Michigan Administrative Hearings System, the executive order transfers the authority of the WCAC chairperson over administrative matters (including authority for scheduling and assignments) to the director of the MAHS, department deputy director Michael Zimmer.

4. Qualifications Advisory Committee

The Qualifications Advisory Committee (QAC) is a 10-member committee, appointed by the governor, charged with overseeing the appointment process for the Workers' Compensation Board of Magistrates and Appellate Commission. The QAC recommends candidates to the governor for the BOM and WCAC, evaluates performance of magistrates and commissioners, and reviews caseloads and makes recommendations to the governor on the number of magistrates and commissioners. Commission members are appointed to four-year terms. The QAC was originally established with the enactment of Public Act 103 of 1985.⁷

5. Workers Compensation Board of Magistrates

The 17-member Board of Magistrates hears appeals on workers compensation claims decided by the Workers Compensation Agency. Originally established as a 30-member panel, the Board of Magistrates was established with the enactment of Public Act 103 of 1985. The board was reduced to 26 members with ERO 2003-1 and reduced to 17 members with Executive Order 2009-53. Each magistrate is a licensed attorney in Michigan and must demonstrate knowledge (through passage of an examination) or have experience in worker's compensation. Magistrates are appointed to four-year terms, but cannot serve more than 12 years. In addition to resolving workers compensation claims disputes, magistrates also review and approve all redemption (settlement) agreements. The annual caseload for the board has averaged 13,700 cases – claims disputes, redemption agreements, etc. – for the last five years (2006-2010).

Reorganization of the SOAHR Rule Promulgation Functions

EO 2011-5 transfers SOAHR's oversight responsibilities concerning the promulgation of administrative rules to a new Office of Regulatory Reinvention (ORR). The ORR would be tasked with the responsibility of "creating a regulatory environment and regulatory processes that are fair, efficient, and conducive to business growth and job creation through its oversight and review of current rules and regulations and proposed rulemaking and regulatory activities by all departments and agencies."

Under the executive order, the department director would also serve as the director of ORR and Chief Regulatory Officer. Previously, rule promulgation functions were coordinated by an Administrative Rules Manager within SOAHR. The responsibilities of that position are now vested in the Chief Regulatory Officer.⁸

In addition to its responsibilities of granting agency requests for rule making (RFR) and reviewing proposed rule sets, the ORR would also review existing rules as well. ORR review of rules would be done in cooperation with various rules advisory committees named by the ORR "with the expectation that a broad spectrum of stakeholders, including members of the regulated community and the general public, will be included in their membership."

⁷ See Section 209 of the Worker's Disability Compensation Act, MCL 418.209. The QAC was abolished, and re-established with ERO 2003-1, MCL 445.2011.

⁸ Additionally, under the current rule making process, each department has a Regulatory Affairs Officer who coordinates the rule making activities of their department and ensures compliance with the Administrative Procedures Act, the various executive orders and SOAHR/ORR policies.

The ORR would receive all existing and proposed rules by considering a number of factors:

1. Health or safety benefits of the rules.
2. Whether the rules are required by the constitution or statute.
3. Compliance costs, taking into consideration complexity, reporting requirements, and other factors.
4. The extent to which rules conflict with, or duplicate, similar state or federal rules.
5. The extent to which rules exceed national or regional compliance requirements or other standards.
6. The date of the last evaluation and degree to which technology, economic conditions, or other factors have changed the regulated activity.
7. Other changes or developments since implementation that demonstrate there is no continued need for the rules.
8. Recommendations of any rules advisory committee.
9. Recommendations of departments and agencies that implement or enforce the rules.
10. The nature of public comments received about the rules.
11. Other factors considered necessary or appropriate by ORR.

The promulgating agency and the advisory committees would be also review rules based on factors 1 - 7 above. Additionally, agencies would have to complete a detailed cost-benefit analysis for all proposed rule sets. The analysis would be specifically discuss the methodology used to estimate the cost impact, and discuss any assessment of any disproportionate impact of the rules based on industrial sector, segment of the public, business size, geographic location, environmental resource and other factors determined by ORR. This analysis would be in addition to the Regulatory Impact Statement (RIS) required under Section 45 of the Administrative Procedures Act.⁹

To the Department of Civil Rights

EO 2011-4 transfers the Hispanic/Latino Commission, the Asian Pacific American Affairs Commission, and the Commission on Disability Concerns to the Department of Civil Rights. The Department of Civil Rights currently houses the Michigan Women's Commission. Most states have advisory or advocacy commissions for various constituency groups, with a handful of states providing a centralized administrative support office for several commissions. These states include Utah,¹⁰ Maryland,¹¹ Oregon,¹² and South Carolina.¹³

The Hispanic/Latino Commission is established under the Public Act 164 of 1975. The commission, with staff support by the Office of Hispanic/Latino Affairs, is charged with developing "a unified policy and plan of action" to serve the needs of the state's Hispanic/Latino population. The commission works to advance the education, employment, civil rights, health, and housing interests of Hispanic/Latino people in the state. The act also establishes an interagency council comprising department directors that is to coordinate and facilitate the exchange and dissemination of information on programs for Hispanic/Latino people. As originally enacted, these entities were established within the Department of Management and Budget. They were subsequently

⁹ For a review of the current rule making process, see the SOAHR website, <http://www.michigan.gov/soahr>. For a review of the rule making procedures of the states see, Jason A. Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings*, New York University of Law, Institute for Policy Integrity, Research Report No. 6, November 2010, http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf. A review and critique of the Michigan rule making process starts on page 265.

¹⁰ Department of Community and Culture, Office of Ethnic Affairs, <http://ethnicoffice.utah.gov>. The office supports the Asian Advisory Council, the Black Advisory Council, the Hispanic/Latino Advisory Council, the Pacific Islander Advisory Council, and the MLK Commission.

¹¹ Governor's Office of Community Initiatives, <http://www.community.maryland.gov>. Among the office's many duties is providing support for the Commission on African Affairs, the Commission on African American History and Culture, the Commission on American Indian Affairs, the Commission on Asian Pacific American Affairs, the Commission on Hispanic Affairs, and the Commission on Middle Eastern American Affairs.

¹² Oregon Advocacy Commissions Office, <http://www.oregon.gov/OAC>. The office supports the Commission on Black Affairs, Commission on Women, Commission on Asian Affairs, and the Commission on Hispanic Affairs.

¹³ South Carolina has a single Commission for Minority Affairs, <http://www.state.sc.us/cma/index.html>.

transferred to the Department of Civil Rights by Executive Order 1991-29,¹⁴ to the Department of Career Development by Executive Order 2000-5,¹⁵ and finally to the Department of Labor and Economic Growth with Executive Order 2003-18.¹⁶ For FY 2012, the Executive Budget Recommendation proposes to transfer one of the two support staff members (the administrative assistant) to another area within DELEG.

The Asian Pacific American Affairs Commission was first established within DELEG with the enactment of Public Act 536 of 2008. Subsequently, the commission was re-established and expanded from 15 members to 21 members with Executive Order 2009-21.¹⁷ The order also abolished a separate advisory council on Asian Pacific American Affairs that was established within the Department of Civil Rights by Executive Order 2005-10. Public Act 536 provides for the establishment of an Office of Asian Pacific American Affairs to provide staff support to the commission. The establishment of that office is contingent upon an appropriation being made. To date, that has not happened. The commission has no staff support or funding. Public Act 536 also establishes an interagency advisory council

The Commission on Disability Concerns was first established with the enactment of Public Act 58 of 1978 as the Commission on Handicapper Concerns within the Department of Labor. That commission was abolished and the Commission on Disability Concerns was established with Executive Order 1995-11 within the Department of Labor.¹⁸ The CDC was later moved to the Family Independence Agency with Executive Order 1992-6 when the Department of Labor was merged with the Department of Commerce to form the Department of Consumer and Industry Services (now DELEG, in two months LARA).¹⁹ The CDC moved back when DELEG was created in 2003. In 2009, Governor Granholm issued Executive Order 2009-40 reestablishing the commission.²⁰

The Division on Deaf and Hard of Hearing is organized within the Commission on Disability Concerns, and is also transferred to the Department of Civil Rights. The Division on Deafness and the Advisory Council on Deaf and Hard of Hearing are established under Public Act 72 of 1937. Originally the division and the advisory council were established within the Department of Labor. They were later transferred to the Family Independence Agency when the Department of Consumer and Industry Services was established in 1996. In 2002, the division was renamed the Division on Deaf and Hard of Hearing (DODHH). The DODHH and the advisory council moved back when DELEG was created in 2003.

To the Department of Environmental Quality

EO 2011-4 transfers the energy policy functions of the Bureau of Energy Systems to the Department of Environmental Quality (DEQ). The Bureau of Energy Systems was established following Executive Order 2008-20²¹ which added energy efforts to the department's efforts. EO 2011-4 transfers to the DEQ the functions of the bureau related to energy policy, energy efficiency, alternative energy, green infrastructure, green programs and practices, low-impact design, sustainability, and recycling that were transferred to DELEG with EO 2008-20.

To the Department of Education

EO 2011-4 transfers the Wage and Hour Division's responsibility for administering and enforcing the Youth Employment Standards Act, Public Act 90 of 1978 to the Department of Education. A key aspect of youth employment is the issuance of work permits for work-age youth. These permits are administered by "issuing officers" which are school administrators under the act.

¹⁴ Executive Reorganization Order 1991-20, codified at MCL 37.111.

¹⁵ Executive Reorganization Order 2000-3, codified at MCL 18.311. This order abolished the interagency council.

¹⁶ Executive Reorganization Order 2003-1, codified at MCL 445.2011. This order re-established the interagency council. There were several other later executive reorganization orders that updated the composition of the council to reflect the changing structure of the state departments. Public Act 146 of 2010, which expanded the duties of the commission and the office, and changed their name, finally updated the membership of the council.

¹⁷ Executive Reorganization Order 2009-16, codified at MCL 445.1992.

¹⁸ Executive Reorganization Order 1995-10, codified at MCL 395.351.

¹⁹ Executive Reorganization Order 1996-2, codified at MCL 445.2001. The FIA is now the Department of Human Services.

²⁰ Executive Reorganization Order 2009-28, codified at MCL 445.2012.

²¹ Executive Reorganization Order 2008-4, codified at MCL 445.2025.

To the Department of Technology, Management, and Budget

EO 2011-4 transfers the DELEG Bureau of Labor Market Information and Strategic Initiatives (LMI) to DTMB. The Office of Labor Market Information produces the official labor market information data for the state and regions (employment and unemployment data), conducts labor market research analysis, and provides data and other resources to businesses, workforce and economic development agencies, educational institutions and other agencies. The Office of Strategic Initiatives conducts research and analysis that guide policy and program development for the department, the workforce development boards, the MEDC, and the governor's office. The bureau's activities are funded under the federal Wagner-Peyser Act and are undertaken in concert with the federal Bureau of Labor Statistics. This function was previously a responsibility of the Michigan Employment Security Agency, and was later transferred to the Michigan Jobs Commission, which became the Department of Career Development and, eventually DELEG.

To the Michigan Strategic Fund (Michigan Economic Development Corporation)

EO 2011-4 transfers several functions from DELEG to the Michigan Strategic Fund. The most prominent of these functions is the Bureau of Workforce Transformation. With the transfer, the bureau would be renamed the Workforce Development Agency. The Bureau was formally established in January 2008 by consolidating and re-focusing the efforts of the Bureau of Workforce Programs and the Bureau of Career Education Programs.²² The bureau administers a number of workforce development programs under federal law including the Workforce Investment Act, welfare-to-work (JET), trade adjustment assistance, veterans employment assistance, adult education programs, and programs for migrant and seasonal workers. The bureau is divided into two "sides" the worker side, which includes the several workforce development programs, and the employer side. The employer side consists of the Regional and Sectoral Strategies Division and the Meeting Employer Needs Division aimed at building and supporting regional skills alliances and community efforts (such as the WIRED), working with employers on lifelong learning and career readiness efforts, working with community colleges and local M-TEC partners, providing assistance in layoff aversion, employee retention, and maintaining the Michigan Talent Bank.

Additionally, MSF would also receive functions of the Bureau of Energy Systems that were not transferred to the Department of Environmental Quality, as well as oversight of the Energy Efficiency and Renewable Energy Revolving Loan Fund established with the enactment of Public Act 292 of 2009.

The MSF would also receive, from the Wage and Hour Division, responsibility for administering and enforcing the Prevailing Wage on State Projects Act, Public Act 166 of 1965, which covers state, public school, community college, and university construction projects that are paid with state funds or state-backed bonds. Under the act prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. The prevailing rates provide an hourly rate which includes wage and fringe benefit totals for designated construction mechanic classifications. The division establishes the prevailing rate for each classification of construction mechanics requested by a contracting agent prior to contracts being let out for bid on a state project. The division will investigate complaints alleging a failure to comply with the act.

Transfer of MSHDA and the LBFTA

Executive Order 2010-2 transferred the Michigan State Housing Development Authority and the Land Bank Fast Track Authority from DELEG to the Department of Treasury.²³ EO 2011-4 transfers the two authorities to the Michigan Strategic Fund. The MSF has been organized within the Department of Treasury since the enactment of Public Act 225 of 2005.

²² Department of Energy, Labor, and Economic Growth, *State Announces New Bureau of Workforce Transformation Unprecedented re-design will drive change to a system of lifelong learning; Radically restructures workforce efforts*, January 17, 2008, http://www.michigan.gov/dleg/0,1607,7-154-10573_11472-183738--,00.html

²³ Executive Reorganization Order 2010-2, codified at MCL 12.194

Miscellaneous Changes

EO 2011-4 formally abolishes the position of the Automobile and Home Insurance Consumer Advocate established by Executive Order 2008-2.²⁴ The Insurance Advocate was to conduct hearings and receive public testimony and investigate state insurance laws, regulations, and practices to assess the impact of automobile and home insurance rates, rules, and forms on Michigan consumers. The Insurance Advocate was also tasked with the responsibility of appearing before the OFIR Commissioner on behalf of insurance consumers in matters affecting automobile and home insurance and providing educational outreach for insurance consumers. For FY 2011, the DELEG budget only funded the position for half of the fiscal year (October through April).

Additionally, EO 2011-4 also abolished the position of Chief Energy Officer (the DELEG director), established by Executive Order 2008-20 which added energy efforts to the department's mission.²⁵ In serving as Chief Energy Officer, the DELEG director was directed to "promote the use of renewable energy, the development of advanced energy technologies, and the implementation of energy efficiency measures in this state" and "serve as an advisor to the Governor on matters relating to renewable energy, energy efficiency, and other energy matters." Energy policy functions of the Bureau of Energy Systems were transferred to the Department of Environmental Quality.

²⁴ Executive Reorganization Order 2008-1, codified at MCL 445.2005

²⁵ Executive Reorganization Order 2008-4, codified at MCL 445.2025