

Presentation to
House Select
Committee on
Administrative
Procedure Laws on
H162 v3, section 4

OSBM
September 2017



Outline

- What is the purpose of rules and what is the current rulemaking process?
- What rules would be affected by Section 4 of H162?
- What are some concerns with Section 4?
- What are some potential options?

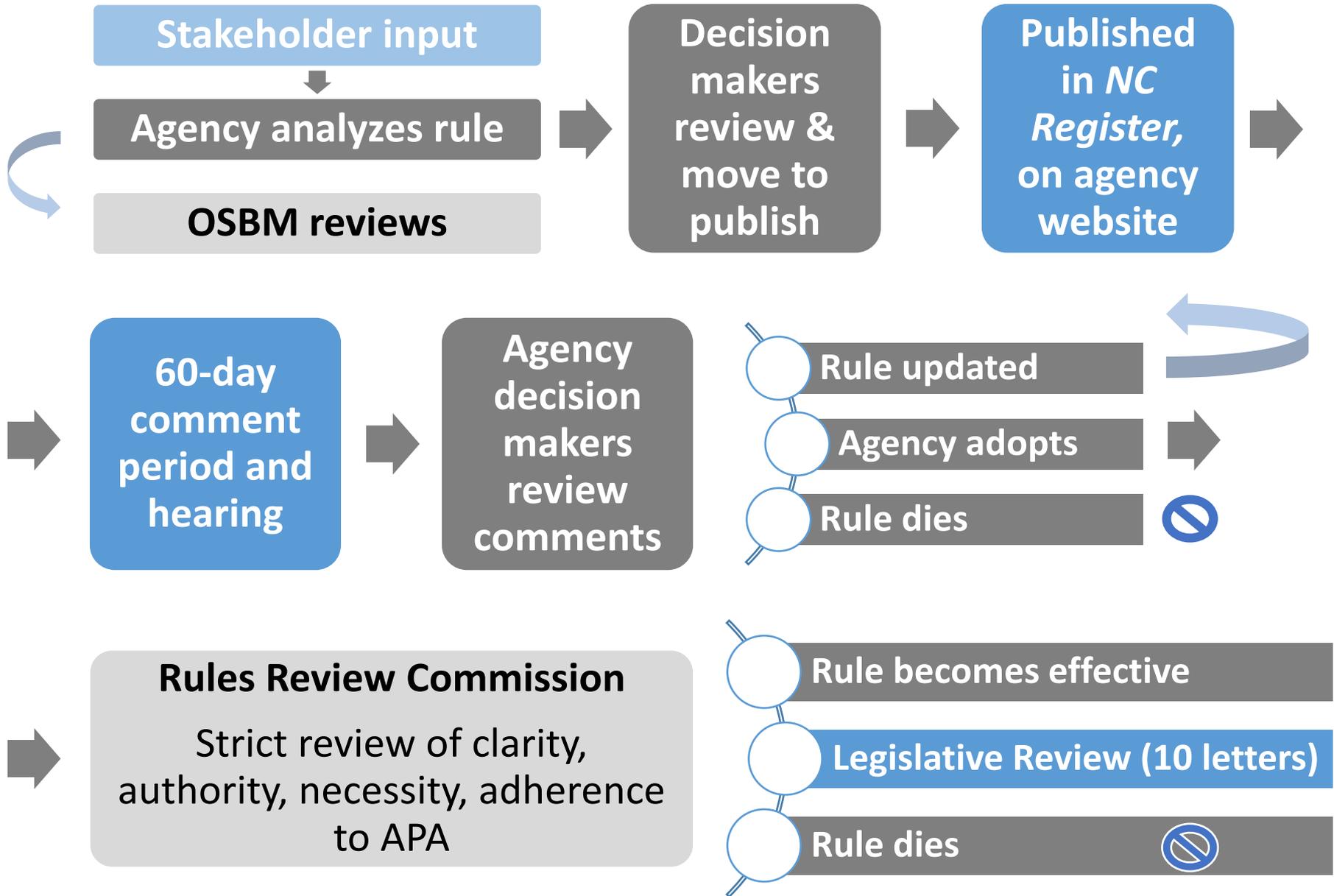
- Appendix



What is the Purpose of Rules?

- **Clarify requirements** (most often statutory and federal requirements)
- Lay out **compliance procedures** for regulated community
 - Majority of rules are procedural in nature
- Provide a **uniform and transparent framework** for enforcement
- **Create certainty** in expectations for the regulated community and public
- Set **enforceable guidelines for the agency** to follow
 - Agencies get sued if they do not follow their own rules
- **Avoid using policies, manuals, and guidelines**, which lack opportunity for public input, enforceability, and oversight
- Rules can apply to various sizes of regulated communities, e.g.:
 - A handful of facilities using a certain kind of X-ray machine, or
 - All children who need to be immunized and their parents

Permanent Rulemaking Process





Universe of Affected Rules

The H162 Sec. 4 provision applies to the **entirety of the rule set**, not just what is changed, for the following:

- **New rules** or **proposed amendments** to existing rules (i.e. regular rulemaking)
 - Statutorily required changes
 - Federally required changes
 - Rulemaking petitions
- **Readoptions** of existing rules

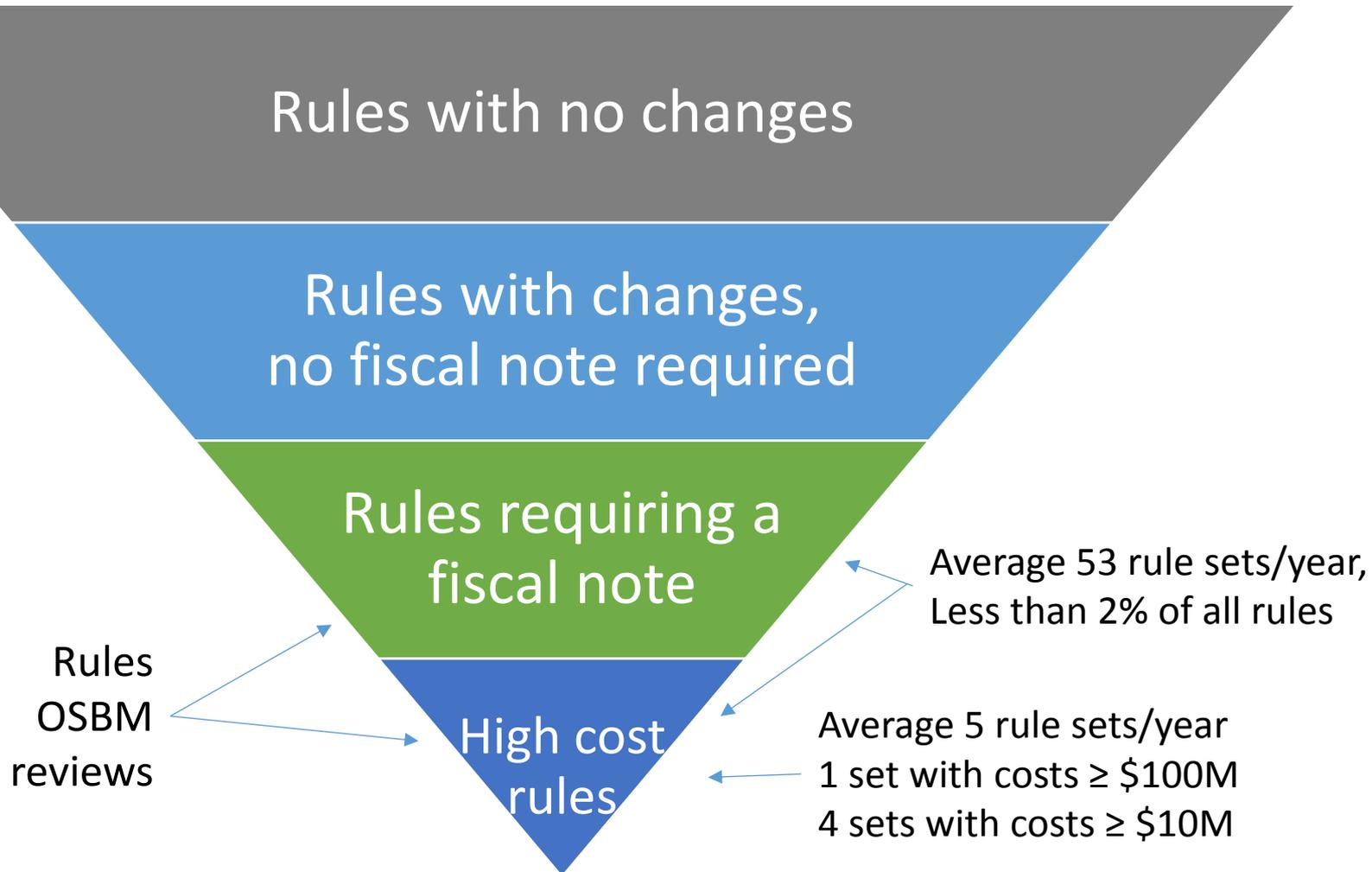
Agencies will be estimating the cost of **the entire Code** in the long run

- Section 3 of H162 requires readoption of all necessary rules



Rules OSBM Reviews

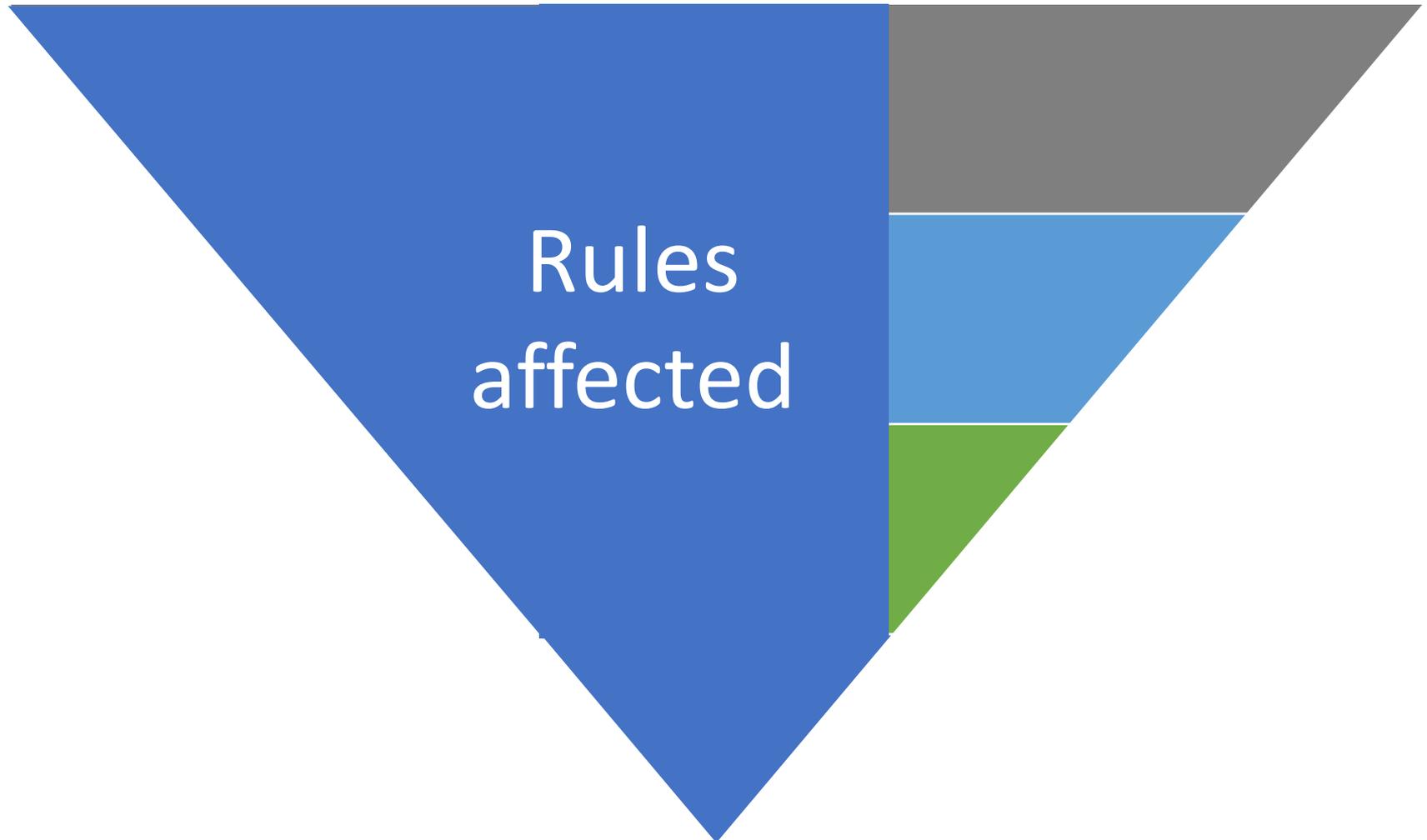
Total of approx. 22,000 rules



Pyramid includes readoptions and new proposed rule changes
Not drawn to scale



Universe of Affected Rules



Pyramid includes readoptions and new proposed rule changes
Not drawn to scale



Examples of Sets of Rules Potentially Impacted

- Federally required or on which federal funding depends
 - Radiation protection rules
 - Foster care and adoption
- Rules with high cost, but potential benefit cost ratio > 1
 - Immunization schedule rules
 - 911 Board rules
 - Adult care homes licensing and inspections
 - DMA rules (procedural)
 - Electronic filing rules (technology based efficiencies)
- Deregulatory rules with high cost
 - Exemptions from vehicle emissions inspections
- Rule sets with transfer
 - Employment compensation system



Concerns

- **Health and safety risk** if agencies lose certain rules
- **Counter to regulatory reform** provisions enacted by the legislature
 - Reluctance to adopt policies, manuals, and guidance into rules
 - Less likely to make deregulatory changes, or any change, to rules in the short run
- **Loss of transparency** and information available to decision-makers and public
 - No incentive to quantify impacts, especially costs
 - Incentive to divide sets making it difficult to estimate impact of policy
- **Conflicting directives** between H162 and statutory mandates/ federal requirements
 - Lose funding
 - Regulated community would have to deal with federal agencies
- **Skewed focus** on costs abstract of relationship to benefits



Implementation Ambiguities

- **Validation and burden of proof**
 - Who is responsible for verifying the cost estimates?
 - Do agencies need to provide an analysis?
 - Are agencies estimating future costs and how do agencies deal with costs already incurred?
- **Rules with uncertain or unquantifiable costs**
 - How will a rule with uncertain or unquantifiable impacts be handled through H162?
- **Definition of “set of rules”**
 - Who will determine what comprises a cohesive “package” of rules?
- **Timeline**
 - How will the rulemaking timeline change given the extra workload for agencies and the volume of rules expected to go through legislative review?



Potential Options

- Restrict language to limitation only
- Clarify existing language to address implementation concerns
 - What rules does this apply to? Should certain rules be exempt?
 - Who oversees the process? Should this process be linked to the fiscal note analysis?
 - What is the baseline?
- Alternative approaches
 - Establish public petition for retrospective analysis of existing rules (with zero baseline), subject the rule to Legislative Review
 - Ask rules that meet a certain cost threshold to have a program evaluation plan
 - Subject more new rules to legislative review when creating statutory mandates



APPENDIX



H162 Section 4 Addition to APA

RESTRICTIONS ON RULES WITH SUBSTANTIAL FINANCIAL COSTS

“§ 150B-19.4. Requirements on rules with substantial financial costs.

(a) Prohibition. – Notwithstanding any authority given to an agency to adopt a rule, an agency may not adopt a permanent *rule or set of rules* with a projected *aggregate financial cost* to all persons affected equal to or *greater than one hundred million dollars (\$100,000,000) during any five-year period*. The agency's determination of the projected aggregate financial cost of a permanent rule or set of rules shall comply with the requirements of G.S. 150B-21.4(b1). The agency's determination of the projected aggregate financial cost of a permanent rule or set of rules shall not include any financial benefits of the permanent rule or set of rules. [...]



H162 Section 4 Addition to APA

[...]

“(b) Limitation. – If an agency determines that a proposed permanent rule or set of rules will have a projected aggregate financial cost to all persons affected equal to or ***greater than ten million dollars (\$10,000,000) during any five-year period***, the adoption of the permanent rule or set of rules must comply with the following:

- 1) If the agency is a board, a commission, a council, or other similar unit of government, a certification that the adoption of the rule or set of rules must be approved by at least sixty percent (60%) of those voting on the rule or set of rules.
- 2) For an agency headed by a member of the Council of State, the adoption of the rule or set of rules must be accompanied by a certification signed by the member of the Council of State indicating the member's review and support of the rule or set of rules.
- 3) For all other agencies, the adoption of the rule or set of rules must be accompanied by a certification signed by the Governor indicating the Governor's review and support of the rule or set of rules. [...]



H162 Section 4 Addition to APA

[...]

(c) Legislative Review. – A permanent rule or set of rules subject to the limitation of subsection (b) of this section shall be subject to the provisions of G.S. 150B-21.3(b1) as if, pursuant to G.S. 150B-21.3(b2), the rule or set of rules received written objections from 10 or more persons and a bill specifically disapproving the rule or set of rules was introduced in a house of the General Assembly before the thirty-first legislative day.”



Concerns with APO Draft Bill 2015-TQz-40

- Similar to H162 Section 4, but used “aggregate financial **impact**” instead of “aggregate **cost**”
- Concerns with reverting to that language
 - Aggregate impact has long been interpreted as costs **plus** benefits to all parties, not net impact
 - Rule with \$70M in benefits and \$30M in costs over 5-years would be prohibited (\$70M benefits + \$30M costs = \$100M threshold)
 - Affected rules by “aggregate financial impact” language:
 - Sets of rules with high estimated benefits where benefit cost ratio ≥ 1
 - Deregulatory rules with large impacts
 - Rules that contain large transfers from one party to another
 - Federally required rules where state may lose funds if rule not adopted
 - Sets of rules affecting large number of persons or permits, where per unit cost is relatively small
 - Sets containing a large number of rules, e.g. large readoptions packages or codification of agency policies