

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Individual Freedom: The bill has the potential to help small businesses be free of duplicative, outdated, or overly burdensome rules and regulations.

B. EFFECT OF PROPOSED CHANGES:

Small Business in Florida

Small businesses are the foundation of Florida's economy. Recent statistics show that there are 1,942,200 small businesses in Florida and more than half of these businesses are operated by sole-proprietors, working full-time without any paid employees. Among these "employer firms" (businesses providing full-time jobs to people other than the owners):

- Nineteen out of 20 (97 percent) have fewer than 100 employees.
- Four of every five (81 percent) have fewer than 10 employees.
- Nearly two-thirds (64 percent) have fewer than five employees

In addition to providing a livelihood for their own families, Florida's small-business owners provide more than half (53 percent) of all wage-and-salary jobs in the state's private sector. In Florida, as in the nation as a whole, small firms lead the way in job creation.

From 1991 to 1995, firms with fewer than 100 employees accounted for all net new jobs in the state. Florida's smallest firms (those with fewer than 20 employees) expanded their job rolls by 10.4 percent. During that same period, the state's largest private employers (5,000+ employees) cut their job rolls by 1.9 percent.

The services sector--dominated by small firms--provided the greatest number of net new jobs for Florida during the '91-'95 period. Small (fewer than 100 employees) service operations grew by 5.5 percent. Employment remained essentially unchanged (+0.2 percent) among larger service firms during that period. Wholesale and retail trades were the second-most prolific job generators during the period. Small firms in these sectors lengthened their job rolls by 3.3 percent, nearly twice the growth rate of their larger competitors (1.7 percent).

Small manufacturers logged the highest growth rate of any sector, expanding their workforce by 7.6 percent during this period. Meanwhile, larger manufacturers cut their job rolls by 5.0 percent.

Nationally, small businesses make up over 99 percent of all employing businesses and provide about 50 percent of all jobs. Federal reports show that households owning small businesses are more likely to be high income earners and high wealth holders than those that are not business owners. In 2001, these households owning businesses comprised about 12 percent of all households, but earned over 25 percent of total household income and held over 40 percent of household wealth.¹

Regulatory Review Committee in South Carolina

South Carolina, and other states, has established in law a process whereby if a small business owner believes that an existing or proposed state agency regulation will adversely affect his or her business, he or she may contact and have his or her concerns made known to the South Carolina Small Business Regulatory Review Committee (SBRRC). The SBRRC consists of eleven South Carolina business

¹ SBA Office of Advocacy-Small Business Profile: Florida, www.sba.gov/advo.

owners and the Chairs of the South Carolina House and Senate Labor, Commerce and Industry Committees.

The SBRRC reviews new and existing state agency regulations that may adversely impact small businesses and suggests the implementation of more flexible alternatives to ensure regulatory compliance. The SBRRC has reviewed promulgated agency regulations issued since January 2005. The SBRRC is chartered to ensure that South Carolina's small business community has a level playing field to compete.²

One example of SBRCC assistance occurred in October of 2006 when the South Carolina Chief Information Officer (CIO) issued policy language stipulating that all vendors working on projects greater than \$1,000,000 were to be qualified with a Level 3 Capability Maturity Model Integration (CMMI) designation. The directive was aimed at enhancing the quality of IT project delivery. One estimate for achieving CMMI Level 3 status was at a cost of \$200,000, and would take over a year or more to accomplish. The SBRCC chair was notified of this policy by the South Carolina Chamber of Commerce which had a constituent who would be adversely affected by this policy. The SBRCC chair directed staff to meet with the company and the CIO's office. This simple, but important, step helped open the way for policy changes that recognized the financial and logistical realities of the requirement to obtain the CMMI Level 3 status. The Governor's Office was also involved in the process. As a result of this collaborative process phrases such as "are required to" were changed to "strongly recommend," which allowed state agencies to continue doing business with small businesses. The due date for certification was also extended for another year past the original due date.³

Existing Regulatory Flexibility Legislation & Administrative Procedures Act (APA)

The APA refers to the Commercial Development and Capital Improvements Act to define small business. That Act defines small business as an entity employing 200 or less full-time employees and that, together with its affiliates, has a net worth of less than \$5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement shall include both personal and business investments.⁴ This definition includes approximately 97% of firms in the state based on 2002 census. (Under the APA an agency may define "small business" to include businesses employing more than 100 persons if it finds that such definition is necessary to adapt a rule to the needs and problems of small businesses.⁵

Economic Impact Analysis.

Before the adoption, amendment or repeal of a rule, agencies are "encouraged" but not required to consider the impact of the rule on small businesses and when practicable agencies should reduce the disproportionate impacts on small businesses.⁶ This provision does not include specific economic elements for the agency to consider, only that agencies may prepare a "statement of estimated regulatory costs" which must include an analysis of the impact on small business.⁷

Regulatory Flexibility.

When practicable, agencies must tier its rules to reduce disproportionate impacts on small business.⁸ Agencies must consider alternative methods for reducing the impact of the proposed rule on small business, i.e. establishing less stringent compliance or reporting requirements; establishing less

² <http://www.sccommerce.com/RegulatoryReview.html>.

³ Telephone conversation with Chuck Bundy, Manager-Business Services, South Carolina Department of Commerce, March 19, 2008.

⁴ s. 288.703(1), F.S.

⁵ s. 120.54(3)(b)(2)(a), F.S.

⁶ s. 120.54(3)(b)1. & 2.a., F.S.

⁷ s. 120.541(2)(d), F.S.

⁸ s. 120.54(3)(b)2.a., F.S.

stringent schedules or deadlines; consolidating or simplifying the rule's compliance or reporting requirements; establishing performance vs. design standards; or exempting small businesses from the rule.⁹

Periodic Review: Required review by agencies every two years.

Agencies must identify and correct deficiencies; clarify and simplify its rules; delete obsolete or unnecessary rules; delete rules that are redundant of statutes; and seek to improve efficiency, reduce paperwork or decrease costs.¹⁰

Judicial Review.

A party who is adversely affected by final agency action is entitled to judicial review.¹¹ Agency action is defined as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order."¹² A preliminary, procedural, or intermediate order of the agency or of an administrative law judge is immediately reviewable if review of the final agency decision would not provide adequate remedy.¹³

The court must remand the case to the agency for further proceedings consistent with the court's decision when it finds that the "correctness" of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.¹⁴

Rules Review.

If the agency determines the proposed action will affect small businesses, it must send written notice to the small business ombudsman of the Office of Tourism, Trade, and Economic Development (OTTED).¹⁵ Agencies must adopt regulatory alternatives offered by the small business ombudsman which are feasible and consistent with the stated objective of the proposed rule and which would reduce the impact on small business.¹⁶ If the agency does not adopt the alternatives offered by the small business ombudsman, it must file a detailed written statement with the Joint Administrative Procedures Committee (JAPC) explaining the reason for failure to adopt such alternatives.¹⁷

There is also review of each proposed rule by the Joint Administrative Procedures Committee.¹⁸

Agency Sunset Review.

The Florida Government Accountability Act establishes the agency sunset review process, which determines whether an agency should be abolished, continued, or reorganized. The act establishes a schedule of agency review beginning in 2008. An agency is up for sunset review every 10 years after its initial review.¹⁹ An agency subject to review by the Legislature shall be abolished on June 30 following the date of review, unless the Legislature continues the agency or advisory committee. However, an agency may not be abolished unless the Legislature finds, pursuant to law, that all state laws the agency had responsibility to implement or enforce have been repealed, revised, or reassigned

⁹ s. 120.54(3)(b)2.a., F.S.

¹⁰ s. 120.74, F.S.

¹¹ s. 120.68(1), F.S.

¹² s. 120.52(2), F.S.

¹³ s. 120.68(1), F.S.

¹⁴ s. 120.68(7)(c), F.S.

¹⁵ s. 120.54(3)(b)2.b.I., F.S.

¹⁶ s. 120.54(3)(b)2.b.II., F.S.

¹⁷ s. 120.54(3)(b)2.b.III., F.S.

¹⁸ (s. 120.545(1), F.S.)

¹⁹ s. 11.905, F.S.

to another remaining agency and that adequate provision has been made for the transfer to a successor agency of all duties and obligations relating to bonds, loans, promissory notes, lease-purchase agreements, installment sales contracts, certificates of participation, master equipment financing agreements, or any other form of indebtedness such that security therefor and the rights of bondholders or holders of other indebtedness are not impaired.

If the Legislature does not take action before the date of review to continue the agency or advisory committee, the agency must submit its legislative budget request consistent with the provisions of chapter 216. Such agency shall continue to be subject to annual sunset review by the Legislature until the Legislature enacts legislation relating to the agency's continuation, modification, or termination.²⁰

Not later than July 1, 2 years preceding the year in which a state agency and its advisory committees are scheduled to be reviewed, the agency must provide the Legislature with essentially a performance report.²¹

Upon receipt of an agency report, the Joint Legislative Sunset Committee may and the appropriate committee shall conduct a review of the agency and may direct the Office of Program Policy Analysis and Government Accountability (OPPAGA) to review the agency and its advisory committees, including an examination of the cost of each agency program, an evaluation of best practices and alternatives that would result in the administration of the agency in a more efficient or effective manner, an examination of the viability of privatization or a different state agency performing the functions, and an evaluation of the cost and consequences of discontinuing the agency.²²

No later than March 1 of the year in which a state agency or its advisory committees are scheduled to be reviewed, the committee shall and the joint committee may:

- (1) Review the information submitted by the agency and the reports of any independent reviews directed by the committee, including those conducted by the Office of Program Policy Analysis and Government Accountability.
- (2) Consult with the Legislative Budget Commission, relevant substantive and appropriations committees of the Senate and the House of Representatives, the Governor's Office of Policy and Budgeting, the Auditor General, and the Chief Financial Officer, or their successors, relating to the review of the agency and its advisory committees.
- (3) Hold public hearings to consider this information as well as other information and testimony that the committee or joint committee deems necessary.
- (4) Present to the President of the Senate and the Speaker of the House of Representatives a report on the agencies and advisory committees scheduled to be reviewed that year by the Legislature. In the report, the committee shall include its specific findings and recommendations regarding the information considered pursuant to s. 11.910, F.S., make recommendations as described in s. 11.911, F.S., and propose legislation as it considers necessary. In the joint committee report, the joint committee shall include its specific findings and recommendations regarding the information considered pursuant to s. 11.910, F.S., and make recommendations.²³

In its report on a state agency, the joint committee shall:

²⁰ s. 11.9055, F.S.

²¹ s. 11.906, F.S.

²² s. 11.907, F.S.

²³ s. 11.908, F.S.

- (a) Make recommendations on the abolition, continuation, or reorganization of each state agency and its advisory committees and on the need for the performance of the functions of the agency and its advisory committees.
- (b) Make recommendations on the consolidation, transfer, or reorganization of programs within state agencies not under review when the programs duplicate functions performed in agencies under review. The joint committee may access or request information and request assistance of state agencies and officers.²⁴

When assistance is requested, a state agency or officer shall assist the joint committee.²⁵

Effect of Proposed Changes

Small Business Regulatory Relief Act & Advisory Council

Section 1 of the bill establishes a short title as the “Small Business Regulatory Relief Act” and provides the findings and purpose for the bill. The bill defines the term “Agency” as an agency as defined in s. 120.52, F.S., which is the definition in the Administrative Procedures Act for an agency. The bill defines the term “rule” as provided in section 120.52, F.S..

The bill also creates the Small Business Regulatory Advisory Council (Council) which is authorized to: provide recommendations to state agencies regarding proposed rules that may impact small business; consider requests from small businesses to review an agency’s rules; review rules to determine whether a rule places an unnecessary burden on small businesses; consider requests from small business owners to review small business owners’ private property rights related to rules or programs adopted or implemented by an agency; and to make recommendations to the agency to mitigate adverse impacts to small businesses. The bill states that the Council is independent from but attached to the Office of Tourism, Trade, and Economic Development.

Three members are appointed each by the Governor, the President of the Senate, and the Speaker of the House for staggered terms. The bill restricts the Council from interfering with administrative or judicial or to issue subpoenas. The bill requires the Council to provide a report to the Governor and the Legislature that describes the activities and recommendations of the Council.

The bill further provides discretion to the Council to participate in the agency sunset review process according to the sunset review schedule contained in s. 11.905, F.S., by reviewing rules of agencies to determine whether the rules should be continued without change or should be amended or repealed to reduce the impact on small business subject to the requirement that the recommendations of the Council must be feasible and consistent with the stated objectives of the proposed rules. If the Council reviews an agency’s rules, the Council must provide a report to the Joint Legislative Sunset Committee, the Governor, and the Legislature with recommendations and evaluations of these rules and agencies regarding regulatory fairness for small businesses. A component of the report is a rating system entitled the “Small Business Friendliness and Development Scorecard.”

Small Business Advocate

Section 2 of the bill creates the Office of the Small Business Advocate and provides for the selection of an advocate by OTTED. The Director’s duties include:

- serving as staff for the Small Business Regulatory Advisory Council;
- serving as principal advocate in the state on behalf of small business including participation in the consideration of legislation and administrative rules that affect small business;

²⁴ s. 11.911, F.S.

²⁵ s. 11.918, F.S.

- working with public and private agencies and organizations to provide information to small business about state and local programs, including small business finance, and to consult with those in academia with particular expertise;
- issuing a biennial report evaluating the efforts of state agencies, that significantly regulate small businesses, to assist minority and other small business enterprises, and make recommendations where appropriate to assist the development and strengthening of minority and other small business enterprises;
- creating an annual process for small businesses to nominate agency regulations for amendment or repeal and to post those nominations online and update the status of agency action on those nominations twice yearly;
- coordinate a statewide conference on small business;
- coordinate annual public meetings to educate small businesses on disaster preparedness; and
- submit an annual report to the Governor and the Legislature on the activities and recommendations of the advocate.

Joint Legislative Sunset Committee

Section 3 of the bill amends s. 11.908, F.S., to require the Joint Legislative Sunset Committee to consult with the Small Business Regulatory Advisory Council relating to the review of agencies.

Section 4 of the bill amends s. 11.911, F.S., to require the Council's report on agency rules to be included in recommendations by the Joint Legislative Sunset Committee where the Committee recommends continuation or reorganization of an agency.

Section 5 of the bill amends s. 11.919, F.S., to require state agencies to assist the Council upon request.

Administrative Procedures Act

Section 6 of the bill amends s. 120.54, F.S., to require agencies to prepare a statement of estimated regulatory cost of a proposed rule as provided in s. 120.541, F.S., if the rule will have an impact on small business. The bill also amends s. 120.54(3), F.S., to require an agency to provide written notification to the Council of any proposed rule that will affect small businesses. Further the bill requires an agency to adopt the regulatory alternatives offered by the Council which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. Current law requires adoption of alternatives offered by OTTED. However, if the agency opts not to adopt all the alternatives offered by the Council, it is required to file a detailed written statement with the JAPC and the Council prior to rule adoption explaining its reasons. The bill also revises section 120.54(3) to allow the Council to request OPPAGA review of an agency's decision to reject the regulatory alternatives. In conducting its review, OPPAGA is required to consider whether the rejected alternatives reduce the impact on small business while meeting the stated objectives of the proposed rule. OPPAGA has 30 days in which to respond to the Council's request and provide its findings to JAPC. The Committee must report OPPAGA's findings to the agency and the agency must respond in writing to JAPC if OPPAGA found that the alternative reduced the impact on small business while meeting the stated objectives of the proposed rule. If the agency still will not adopt the alternative, it must also provide a detailed written statement to JAPC as to why it will not adopt the alternative.

Section 7 of the bill amends section 120.74(1), F.S., which requires agencies to review its rules periodically but at least provide a formal review every two years, by requiring an agency to determine whether its rules should be amended or repealed to reduce the impact on small business while meeting the stated objectives of the proposed rule.

Section 8 of the bill creates an effective date of July 1, 2008.

C. SECTION DIRECTORY:

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Section 1: Provides for the Small Business Regulatory Relief Act, findings and purpose; creates the Small Business Regulatory Advisory Council; provides for council review of agency rules under sunset review process; provides reporting requirements.

Section 2: Provides for the findings and purpose of the Small Business Advocate; creates the office of small business advocate; provides reporting requirements.

Section 3: Amends s. 11.908, F.S., relating to the consulting duties of the Joint Legislative Sunset Committee.

Section 4: Amends s. 11.911, F.S., relating to the recommendations of the Joint Legislative Sunset Committee.

Section 5: Amends s. 11.919, F.S. relating to agency assistance to the Small Business Regulatory Council.

Section 6: Amends s. 120.54, F.S., requiring agencies to prepare an statement of estimated regulatory cost; requiring agencies to notify the Small Business Regulatory Advisory Council of impacts of rules on small business; requiring agencies to consider alternatives proposed by the Small Business Regulatory Advisory Council; establishing a review procedure for alternatives not utilized by agencies.

Section 7: Amends s. 120.74, F.S., relating to periodic agency review of rules and impacts on small business.

Section 8: Creates an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The position of Small Business Advocate can be selected from an existing staff position in the Office of Tourism, Trade, and Economic Development (OTTED).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Small businesses will benefit in several ways.

1. A single voice for small business will be created by the bill (Small Business Advocate) to advocate in numerous ways on behalf of small business in front of government and in coordination with the private sector.

2. A council dedicated to reviewing agency rules that may have an impact on small business is created by the bill and the council is authorized to offer alternatives that must be considered by state agencies.
3. Agencies are required to prepare a statement of estimated regulatory cost if the proposed rule will have an impact on small business which will allow small businesses to be informed on how rules may affect their operations.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Not applicable.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.