

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1565 Rulemaking

SPONSOR(S): Dorworth and others

TIED BILLS: IDEN./SIM. BILLS: SB 1844

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee		McDonald	Williamson
2)	Economic Development & Community Affairs Policy Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

Currently, under the Administrative Procedure Act each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on a small business. A small business is defined as an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in this state that has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement includes both personal and business investments. Under the current process, an agency is required to provide the Small Business Advisory Council (Council) and the Office of Tourism, Trade, and Economic Development in the Executive Office of the Governor with notice of a proposed rule that affects small businesses 28 days prior to its adoption. The Council has 21 days after it receives notice of a rule in which to review the impact of that rule on small businesses and offer alternatives to lessen the identified impact. If an agency does not adopt all alternatives offered by the Council, it must, prior to rule adoption or amendment, file a detailed written statement with the Administrative Procedures Committee and the Council explaining the reasons for failure to adopt the alternatives.

The bill adds determinations that must be made prior to the adoption, amendment, or repeal of a rule. If an agency initially determines that a rule adversely affects or increases regulatory costs to small businesses, the agency must retain an independent entity, which can be a third party or the Legislature, to do an independent economic analysis. The analysis can also be triggered by a request from the Council. The analysis must be certified by the Office of Economic and Demographic Research. A further independent analysis is required to determine if a rule that was the subject of the first analysis would result in a net creation of new private sector jobs and reduce the state's unemployment rate. Finally, the bill requires the Legislature to ratify rules that an agency cannot demonstrate would result in creation of new private sector jobs and reduce the state's unemployment rate. Emergency rules are exempt from the requirements for independent analysis and ratification by the Legislature.

The bill raises issues relating to a violation of separation of powers between the executive and legislative branches of government. See "Constitutional Issues" section for further discussion.

The bill has an indeterminate, but potentially significant fiscal impact. See "Fiscal Comments."

The bill takes effect July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Administrative Procedure Act¹

Administrative Procedures Committee²

Within the Administrative Procedure Act, the responsibility of the Administrative Procedures Committee of the Legislature is spelled out. As a legislative check on legislatively created authority, the committee is required to examine every proposed rule, unless exempted by law, and existing rules to make certain determinations. Among those are such things as:

- Is the rule an invalid exercise of delegated legislative authority,
- Has the statutory authority for the rule been repealed,
- Is it in proper form, was proper notice given and was it adequate for the purpose and effect of the rule,
- Is it consistent with expressed legislative intent,
- Is it a reasonable implementation of the law as it affects persons impacted,
- Is it necessary to implement the law cited, and
- Could regulatory costs on persons impacted by the rule be reduced by adoption of a less costly alternative.³

The Administrative Procedures Committee then makes recommendations for change in the law, if determined necessary. Those recommendations for change, if any, are presented as legislation to come before the House of Representatives and Senate for consideration just as are other issues.⁴

Rules Relating to Small Business

Each agency, before the adoption, amendment, or repeal of a rule, is required to consider the impact of the rule on a small business. A small business means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in this state that has a Small Business

¹ Codified in chapter 120, F.S.

² See s. 120.545, F.S.

³ See s. 120.545(1), F.S.

⁴ See s. 120.545(8), F.S.

Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement includes both personal and business investments.

Under the current process, an agency is required to provide the Small Business Advisory Council (Council) and the Office of Tourism, Trade, and Economic Development in the Executive Office of the Governor with notice of a proposed rule that affects small businesses 28 days prior to its adoption. The Council has 21 days after it receives notice of a rule in which to review the impact of that rule on small businesses and offer alternatives to lessen the identified impact. According to the staff of the Joint Administrative Procedures Committee (Committee), the Council meets once each month, which means that the 21 day deadline is sometimes past before the Council has had time to consider a rule.⁵ Under current law, if the Council does offer a small business alternative, the time limit for adopting the rule is extended 21 days, within which time the agency must consider the alternative, revise its statement of estimated regulatory costs as necessary, and accept or reject the alternative. If an agency does not adopt all alternatives offered by the Small Business Regulatory Advisory Council, it must, prior to rule adoption or amendment, file a detailed written statement with the Administrative Procedures Committee and the Small Business Regulatory Advisory Council explaining the reasons for failure to adopt the alternatives.⁶

A statement on estimated regulatory costs (SERC) affecting small businesses must be prepared by an agency and must not be limited to only those proposed rules that have an adverse impact on small business, but be done on any rule that affects a small business. A SERC must include the following:

- A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;
- A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues;
- A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule⁷;
- An analysis of the impact on small businesses and an analysis of the impact on small counties and small cities; and
- Additional information that the agency determines may be useful.

Additionally, agency notices and reports relating to impacts on small business must be sent in writing to the Council and the Committee.

Every 2 years, agencies review their rules and provide a report to the Speaker of the House of Representatives and the President of the Senate regarding changes made to rules that promote efficiency, reduce paperwork, or decrease costs to government and the private sector. In 2008, this requirement was changed to include the economic impact on small businesses. The 2010 report is due October 1, 2010.⁸

Office of Tourism, Trade, and Economic Development⁹

The Office of Tourism, Trade, and Economic Development (OTTED) within the Executive Office of the Governor is responsible for "considering the impact of agency rules on businesses" and for serving "as an advocate for business, particularly small businesses, in their dealings with state agencies."¹⁰

OTTED is charged with reviewing proposed agency actions for impacts on small businesses and with offering alternatives to mitigate those impacts. Also, in consultation with the Governor's rules

⁵ Information received from the Joint Administrative Procedures Committee staff on March 3, 2010.

⁶ See s. 120.54(3)(b), F.S.

⁷ According to s. 120.541(c), F.S., "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, and the cost of monitoring and reporting.

⁸ See s. 120.74, F.S., and s. 8, ch.2008-149.

⁹ Created in s. 14.2015, F.S. With the dismantling of the Department of Commerce in 1996, OTTED was created within the Executive Office of the Governor and assumed some of the roles of the Department of Commerce albeit on a smaller scale.

¹⁰ See s. 14.2015(6)(a), F.S.

ombudsman, OTTED has the power and duty to make recommendations to state agencies on "any existing and proposed rules for alleviating unnecessary or disproportionate adverse effects to businesses."¹¹

Small Business Regulatory Advisory Council¹²

The Small Business Regulatory Advisory Council, an advisory body created in 2008, may make recommendations to agencies on proposed rules or programs that adversely affect small businesses, consider requests from small businesses to review rules or programs adopted by an agency, and review rules promulgated by an agency to determine whether a rule places an unnecessary burden on small business and make recommendations to the agency to mitigate the adverse effects.¹³ The Council actively participates in the Administrative Procedure Act rule review and recommendation process for state agency rules affecting small businesses.

Effect of Proposed Changes

The bill adds determinations that must be made prior to the adoption, amendment, or repeal of a rule. If a rule adversely affects or increases regulatory costs to small businesses, an agency must retain an independent entity, which can be a third party or the Legislature, to do an independent economic analysis. The analysis can also be triggered by a request from the Council. Any analysis that is done must be certified by the Office of Economic and Demographic Research.

A further independent analysis is required to determine if a rule that was the subject of the first economic analysis would result in a net creation of new private sector jobs and reduce the state's unemployment rate. The legislation does not differentiate between different types of rules such as health safety or other necessary regulatory changes that might not show a net increase in private sector jobs and a reduction in unemployment; however, such rules might have a cost impact on small businesses.

Additionally, no indication is given as to how the determination is to be made for reduction of the unemployment rate.

Finally, the bill requires the Legislature to ratify rules except for emergency rules.

In effect, executive rulemaking functions are being shifted to the legislative branch of government which raises concerns regarding separation of powers. See "Constitutional Issues" section for further discussion.

B. SECTION DIRECTORY:

Section 1 amends s. 120.54(3)(b), F.S., creating requirements for an agency if it determines a rule adversely affects small businesses or increases regulatory costs to small businesses; requiring certification of certain economic analyses by the Office of Economic and Demographic Research; requiring rule ratification by the Legislature under certain circumstances.

Section 2 provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

It is unknown how the bill will affect state government revenues.

¹¹ See s. 14.2015(6)(b), F.S.

¹² Created in s. 288.7001, F.S., the advisory council is composed of 9 members who are current or former small business owners, with three members appointed by the Governor, three by the Speaker of the House of Representatives, and three appointed by the President of the Senate. The council is administratively housed in the Florida Small Business Development Center Network.

¹³ See s. 288.7001(3)(c), F.S.

2. Expenditures:

It is unknown Indeterminate, but potentially significant. See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

It is unknown how the bill will affect local government revenues.

2. Expenditures:

It is unknown how the bill will affect local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. Persons or companies performing the kinds of independent analyses required by the bill could see an increase in business based upon the third party contracting requirements. Additionally, there could be a negative impact on businesses caused by delays in review and ratification of rules; or a potentially positive impact on small businesses.

D. FISCAL COMMENTS:

Although indeterminate, the bill will increase expenditures relating to the required independent economic analyses required. The total costs of the economic analyses will be dependent on the number of rule changes that require an analysis, which is not known at this time, and the cost of each analysis required.

According to the Department of Business and Professional Regulation in its analysis of HB 1565:

In 2009, the department proposed 275 rules. As agency regulating businesses and professions, majority, if not all affect small businesses. For purposes of this example, it is estimated that 80% of the proposed rules could fall into the category of low complexity and limited impact requiring a lower threshold independent economic impact analysis estimated at \$5,000. The remaining could fall into the category of high complexity and large impact requiring a higher threshold independent economic impact of \$50,000. Therefore, the initial impact cost would be \$3,850,000.00 (220 x \$5,000 = \$1,100,000) + (55 x \$50,000 = \$2,750,000).¹⁴

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Concerns regarding separation of powers are raised on the following parts of the bill:

- Authorizing the Legislature to serve as the independent entity for reviewing the rules for the executive agencies, if asked, and reporting on those findings and then taking action in its legislative capacity are problematic.

¹⁴ 2010 Bill Analysis & Economic Impact Statement, HB 1844, Department of Business & Professional Regulation, at 6.

- Requiring the Legislature to ratify any rule that has an adverse effect on or increases the regulatory costs of small businesses without increasing private sector jobs or reducing the unemployment rate.

Article II, sec. 3 of the Florida Constitution, states that state government's powers are divided into the legislative, executive and judicial branches. Specifically,

No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

As the United States Supreme Court has stated:

Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of [the legislature] for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of [the legislature] to modify or revoke the authority entirely.¹⁵

This concept was directly addressed by Professor Patricia A. Dore in her seminal article regarding access to administrative proceedings in Florida in which she stated, "[S]tate constitutional problems with legislative participation in agency rulemaking surfaced in the state courts even before the United States Supreme Court held the legislative veto violative of the Federal Constitution in [Chadha]." ¹⁶

State supreme courts and attorneys general in Kentucky, New Hampshire, West Virginia, Tennessee, and Texas have found legislative approval of agency rules as unconstitutional.¹⁷

B. RULE-MAKING AUTHORITY:

The bill has a significant effect on rulemaking authority of agencies. It also shifts rulemaking ratification to the Legislature which is discussed in the "Constitutional Issues" section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 120.52, F.S., provides that "an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Agencies will not be able to promulgate a rule that creates jobs or reduces unemployment unless the implemented statute provides for job creation or unemployment reduction.

The Agency for Health Care Administration stated "this burdensome process will delay necessary rulemaking, compromising an agency's ability to meet its regulatory duties. This has significant ramifications on the health, safety and welfare of the population protected by health care regulatory agencies such as AHCA."¹⁸

The Department Business and Professional Regulation (DBPR) stated "the financial costs and the time required to perform the analysis would paralyze agency rulemaking." Additionally, it stated the workload for the Legislature to assume would not be feasible:

In February 2010 alone, the Florida Administrative Weekly contained Notices of Proposed Rule for 166 rules. If we assume that 50 percent of those rules will meet the threshold requirements of this bill, which is a conservative estimate because 99.8 percent of Florida businesses are small businesses, then the

¹⁵ Immigration & Naturalization Serv. v. Chadra, 462 U.S. 919, 954 n. 16 (1983).

¹⁶ See Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 *Fla. St. U. L. Rev.* 967, 1015-16 (Winter 1986).

¹⁷ *See id.* at 1015-1016.

¹⁸ 2010 Bill Analysis & Economic Impact Statement, SB 1844 (Identical Bill to HB 1565), ACHA, at 2.

legislature could very easily be asked to perform approximately 83 economic analyses per month. Such a workload is not feasible.¹⁹

The DBPR analysis determined that in order to reduce the unemployment rate of 11.8 percent in December 2009, based on a labor force of 9,180,000 people and 1,087,000 jobless people, 8,500 jobs would have to be created to lower the rate to 11.74 percent.²⁰

DBPR also stated there was no direct conflict with federal law; however, the Florida Real Estate Appraisal Board must comply with federal requirements:

Any delay in the rulemaking process may hinder Florida's ability to adopt ever-changing federal requirements for the licensing and practice of the appraisal profession. It may also hinder compliance with the federal mandate to close FREAB cases within one year of the complaint being received by the department.²¹

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

Not applicable.

¹⁹ 2010 Legislative Analysis Form, SB 1844, Department of Business & Professional Regulation, p. 4.

²⁰ Ibid., p. 4.

²¹ Ibid., p 7.