

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1565 **Rulemaking**
SPONSOR(S): Governmental Affairs Policy Committee, Dorworth, Ford and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1844

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Governmental Affairs Policy Committee	14 Y, 0 N, As CS	McDonald	Williamson
2)	Economic Development & Community Affairs Policy Council		McDonald	Tinker
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 small businesses, small counties, and small cities as defined by current law. 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 Joint Administrative Procedures Committee and the Council explaining the reasons for failure to adopt the alternatives.

The bill requires an agency to prepare a statement of estimated regulatory costs (SERC) prior to the adoption, amendment, or repeal of any rule, not just on those having an impact on small business or those requested by a substantially affected person. Emergency rules are exempt from the SERC requirement. Failure of an agency to prepare a SERC on any rule is now a material failure to follow rulemaking procedures or requirements in the Administrative Procedure Act. When a lower regulatory cost alternative to a proposed rule is submitted to an agency, it is required to revise the earlier SERC and either adopt the alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule. The requirements for a SERC are expanded to include an economic analysis that shows if a rule creates a regulatory environment that impedes or hinders economic growth and private-sector job creation; expands the growth of state government that is not provided in the enabling statute for the rule; increases regulatory costs to small businesses; and is likely to adversely impact private-sector job creation or result in higher unemployment.

The bill requires the Joint Administrative Procedures Committee to determine whether a SERC prepared by an agency complies with the requirements for an economic analysis as well as existing requirements for a SERC. If the economic analysis portions of the SERC indicate the proposal will do any of the things reviewed in the economic analysis, the rule may not take effect until it is submitted to the Legislature for review at the next regularly scheduled session. The Legislature may reject, modify, or take no action pertaining to a rule. If the Legislature takes no action, the rule will take effect upon adjournment sine die 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 fiscal impact. See "Fiscal Comments."

This act 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

Joint Administrative Procedures Committee²

Within the Administrative Procedure Act, the responsibility of the Joint Administrative Procedures Committee (Committee) of the Legislature is delineated. As a legislative check on legislatively created authority, the committee is required to examine every proposed rule, unless exempted by law, and may examine 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 the regulated persons, county, or city impacted by the rule be reduced by adoption of a less costly alternative.
- Could the rule be made less complex or more easily understandable by the general public.
- Does the rule require an additional appropriations.
- If an emergency rule, is the emergency status justified.³

If after review of a proposed rule and any information required from an agency, the Committee objects to the rule, it must within 5 days certify the objection to the agency along with its detailed concerns. The Committee also notifies the Speaker of the House of Representatives and the President of the Senate.⁴

Within 30 to 45 days of receipt of the objection, an agency, depending upon its structure, must do the following:

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(2), F.S.

- If the rule is not in effect, it must notice modifications of the rule that address the Committee's concerns or withdrawal of the rule or notify the Committee that it refuses to do either.
- If the rule is in effect, it must notice to amend the rule to address the Committee's concerns or to repeal the rule or to notify the Committee that it refuses to do either.
- If the objection is with the Statement of Estimated Regulatory Costs (SERC), the agency must prepare a corrected SERC, notice it, and send a copy to the Committee or notify the Committee that is will not comply.⁵

If an agency refuses to respond within timeframes required for a proposed rule, the rule is considered withdrawn. All other lack of responses are considered refusals to take action by the agency.⁶

If the Committee objects to a rule, or portion of a rule, and the agency does not begin administrative action consistent with the objection within 60 days after objection or fails to proceed in good faith to complete the action, the 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.⁷

An agency is notified of the Committee's vote to introduce legislation. The Committee may request the agency to temporarily suspend the rule or its adoption "pending consideration of proposed legislation during the next regular session of the Legislature."⁸

An agency has 30 to 45 days to respond to the Committee's request to suspend the rule or its adoption. Failure to respond is considered refusal to act. Nothing prevents an agency from refusing to take action as requested by the Committee.⁹

If legislation addressing the objections fails to become law, the temporary rule suspensions by an agency expire.¹⁰

Statement on Estimated Regulatory Costs (SERC)

An agency is encouraged to prepare a SERC prior to the adoption, amendment, or repeal of any rule other than an emergency rule. A SERC affecting small businesses, however, 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 costs¹¹ likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule;
- An analysis of the impact on small businesses and an analysis of the impact on small counties and small cities;
- Additional information that the agency determines may be useful; and

⁵ See s. 120.545(3)(c), F.S.

⁶ See s. 120.545(4), (5), and (6), F.S.

⁷ See s. 120.545(8), F.S.

⁸ See s. 120.545(8)(b)1., F.S.

⁹ See s. 120.545(8)(b)2., F.S.

¹⁰ See s. 120.545(8)(d), F.S.

¹¹ 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.

- A description of any good faith written proposal submitted for a lower cost regulatory alternative to a proposed rule that substantially accomplishes the objective of the law being implemented and a response by the agency.

Any substantially affected person may submit a written proposal for a lower cost regulatory alternative. Once submitted, an agency is required to do a SERC or revise an existing SERC. The agency must adopt the alternative or give reasons for rejecting it. Failure of the agency to prepare or revise a SERC is considered a material failure to follow rulemaking procedures.

The time frame and basis for a challenge to the validity of a rule based upon the imposition of regulatory costs on the regulated person, county, or city as they relate to a SERC are delineated.¹²

Rules Relating to Small Cities and Small Counties

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small cities and small counties. A small city is defined as a municipality with a population of 10,000 or less unincarcerated persons; however, the population can be more than 10,000 under specified circumstances needed for the adoption of rules. A small county means a county with an unincarcerated population of 75,000 or less; however, the population can be more than 75,000 if needed for the adoption of rules. An agency may use a tiering of rules to avoid a disproportionate impact as well as using other methods of impact reduction that are specified.¹³

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 and a SERC must be prepared. 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 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, 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.¹⁴ 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 Joint Administrative Procedures Committee and the Council explaining the reasons for failure to adopt the alternatives.¹⁵

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, 2010.¹⁶

¹² See s. 120.541(1)(c), F.S.

¹³ See s. 120.54(3)(b)2.a., F.S.

¹⁴ Information received from the Joint Administrative Procedures Committee staff on March 3, 2010.

¹⁵ See s. 120.54(3)(b), F.S.

¹⁶ See s. 120.74, F.S., and s. 8, ch.2008-149.

Office of Tourism, Trade, and Economic Development¹⁷

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 its dealings with state agencies."¹⁸ 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 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."¹⁹

Small Business Regulatory Advisory Council²⁰

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.²¹ 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 requires an agency to prepare a statement of estimated regulatory costs (SERC) prior to the adoption, amendment, or repeal of any rule, not just those having an impact on small business or those requested by a substantially affected person. Emergency rules are exempt from the SERC requirement. Failure of an agency to prepare a SERC on any rule is now a material failure to follow rulemaking procedures or requirements in the Administrative Procedure Act. When a lower regulatory cost alternative to a proposed rule is submitted to an agency, it is required to revise the earlier SERC and either adopt the alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule.

The bill deletes the current prohibitions on declaring a rule invalid because it imposes regulatory costs on a regulated person, county, or city which could be reduced by adoption of less costly alternatives that accomplish the statutory objectives or because of a rule challenge unless other circumstances are met.²²

The bill requires, in addition to other requirements to be included in a SERC, an economic analysis that shows if a rule:

- Creates a regulatory environment that impedes or hinders economic growth and private-sector job creation;
- Expands the growth of state government that is not provided in the enabling statute for the rule;
- Increases regulatory costs to small businesses; and
- Is likely to adversely impact private-sector job creation or result in higher unemployment.

The bill requires the Joint Administrative Procedures Committee to determine whether a SERC prepared by an agency complies with the requirements for an economic analysis as well as existing requirements for a SERC.

¹⁷ 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.

¹⁸ See s. 14.2015(6)(a), F.S.

¹⁹ See s. 14.2015(6)(b), F.S.

²⁰ 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.

²¹ See s. 288.7001(3)(c), F.S.

²² Section 120.541(c), F.S., requires that the issue cannot be raised unless it is raised in an administrative proceeding within 1 year after the effective date of the rule; the substantial interests of the person making the challenge are materially affected by the agency's decision to reject or fail to consider the lower cost alternative, and that the agency failed to prepare or revise a SERC or failed to follow other SERC requirements constituting a material failure to comply with rulemaking.

Finally, the bill provides that if the economic analysis portions of the agency SERC indicate the proposal will do any of the things reviewed in the economic analysis, the rule may not take effect until it is submitted to the Legislature for review at the next regularly scheduled session. The Legislature may reject, modify, or take no action pertaining to the rule. If the Legislature takes no action, the rule will take effect upon adjournment sine die by the Legislature.

B. SECTION DIRECTORY:

Section 1 amends s. 120.54(3)(b), F.S., requiring each agency, before adopting, amending, or repealing a rule, to prepare a SERC of the proposed rule; providing that failure to prepare the statement is a material failure to follow rulemaking procedures.

Section 2 amends s. 120.541, F.S., requiring an agency to revise its SERC upon submission of a lower cost regulatory alternative; removing requirements for declaring rule invalidity; revising required information to be included in a SERC; requiring the Joint Administrative Procedures Committee to determine whether a SERC meets specified requirements; prohibiting a rule taking effect until it is submitted to the Legislature for review; providing that the Legislature may take action or take no action on a rule; providing effective date for rule if no legislative action is taken.

Section 3 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.

2. Expenditures:

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. 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 number of SERCs that agencies must prepare in addition to the economic analysis of certain issues that must be done by agencies as part of the new SERC requirements. It is not known if agencies will be able to perform such economic analyses with their own staff or will have to seek outside assistance in the preparation.

Although indeterminate, the bill will increase the workload of staff of the Joint Administrative Procedures Committee because they will be reviewing a SERC for all proposed rule adoptions, amendments, or repeals. Additionally, staff will be required to make additional determinations

regarding evidence of certain new SERC criteria that will affect whether a rule may or may not take effect prior to the next regularly scheduled session of the Legislature.

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:

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.

It is not clear whether the language contained in s. 120.541(3), F.S., created by the bill is in violation of the constitutional requirement for separation of powers in that it has a subunit of the Legislature making a policy-laden factual decision that determines when a rule might take effect. Depending when a rule is presented to the Joint Administrative Procedures Committee for review, action on a rule could be delayed several months.

B. RULE-MAKING AUTHORITY:

The bill has a significant effect on rulemaking authority of agencies. The bill has an impact on the legislative review process and workload of the Joint Administrative Procedures Committee and its staff.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Declaring A Rule Invalid

The removal of the prohibition of declaring a rule invalid under s. 120.541(1)(c), F.S., except under specified circumstances, is a significant change in the law that opens up challenges to all existing rules and is not predicated on the presentment of a lower cost alternative that has been rejected by an agency. According to the Joint Administrative Procedures Committee, there are approximately 25,000 rules in the Florida Administrative Code that would now be subject to challenge as well as approximately 2500 amendments to rules each year.²³

Agency 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."²⁴

²³ Conversations with JAPC staff on March 30, 2010.

²⁴ 2010 Bill Analysis & Economic Impact Statement, SB 1844 (Identical Bill to HB 1565), ACHA, at 2.

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 legislature could very easily be asked to perform approximately 83 economic analyses per month. Such a workload is not feasible.²⁵

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.²⁶

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2010, the Governmental Affairs Policy Committee adopted a strike-all amendment to HB 1565 and passed the bill as a committee substitute. The committee substitute does the following:

- Requires an agency to prepare a SERC prior to the adoption, amendment, or repeal of any rule, not just those having an impact on small business or those requested by a substantially affected person.
- Requires that a SERC include an economic analysis that shows if a rule creates a regulatory environment that impedes or hinders economic growth and private-sector job creation; expands the growth of state government that is not provided in the enabling statute for the rule; increases regulatory costs to small businesses; and is likely to adversely impact private-sector job creation or result in higher unemployment.
- Requires the Joint Administrative Procedures Committee to determine whether a SERC prepared by an agency complies with the requirements for an economic analysis as well as existing requirements for a SERC.
- Provides that if the economic analysis portions of the agency SERC indicate the proposal will do any of the things reviewed in the economic analysis, the rule may not take effect until it is submitted to the Legislature for review at the next regularly scheduled session.
- Provides that the Legislature may reject, modify, or take no action pertaining to the rule. If the Legislature takes no action, the rule will take effect upon adjournment sine die by the Legislature.

²⁵ 2010 Legislative Analysis Form, SB 1844, Department of Business & Professional Regulation, p. 4.

²⁶ *Ibid.*, p 7.