

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 981 Administrative Procedures
SPONSOR(S): Richardson
TIED BILLS: **IDEN./SIM. BILLS:** SB 1226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	13 Y, 0 N	Stranburg	Rubottom
2) Appropriations Committee	21 Y, 0 N	White	Leznoff
3) State Affairs Committee	15 Y, 0 N	Moore	Camechis

SUMMARY ANALYSIS

A Statement of Estimated Regulatory Costs (SERC) must be prepared during promulgation of agency rules that are expected to affect small businesses or have a significant economic impact. The bill revises the requirements for preparing a SERC to clarify for agencies the time frame for which costs must be evaluated so that decision makers and affected constituencies may understand the economic and policy impacts of proposed rules. The bill creates s. 120.541(5), F.S., to specify that adverse impacts and regulatory costs likely to occur within five years after implementation of a rule include adverse impacts and regulatory costs estimated to occur within five years after the effective date of the rule. The bill also specifies that if any provision of a rule is not fully implemented upon the effective date of the rule, the adverse impacts and regulatory costs associated with such provision must be adjusted to include any additional adverse impacts and regulatory costs estimated to occur within five years after implementation of such provision.

The bill may have an indeterminate but likely insignificant negative fiscal impact to the state.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Agency Rulemaking

One important aspect of the Administrative Procedure Act (APA)¹ is the emphasis on public notice and opportunity for participation in agency rulemaking. A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.² The APA provides specific requirements agencies must follow in order to adopt rules.³

With some exceptions,⁴ required rulemaking begins with an agency publishing a notice of rule development in the Florida Administrative Register (F.A.R.).⁵ If the agency conducts public rule development workshops,⁶ the persons responsible for preparing the draft rule under consideration must be available to explain the proposal and respond to public questions or comments.⁷

Once the final form of the proposed rule is developed (whether the proposal creates a new rule or amends or repeals an existing rule), the agency must publish a notice of the proposed rule before it may be adopted.⁸ The publication of this notice triggers certain deadlines for the rulemaking process.⁹ Each notice must include the full text of the proposed rule and other additional information, such as a summary of the agency's statement of estimated regulatory costs (SERC). The notice must indicate that interested parties may provide the agency with information pertaining to the SERC or propose a lower cost regulatory alternative to the proposed rule. The notice must also state the procedure to request a hearing on the proposed rule.¹⁰

Agency staff must be available to explain the proposed rule and respond to public questions or comments at a public rulemaking hearing. Material pertaining to the proposed rulemaking submitted to the agency between the date of publishing the notice of proposed rule and the end of the final public hearing must be considered by the agency and made a part of the rulemaking record.¹¹ If a person substantially affected by the proposed rule demonstrates that the proceeding does not provide adequate opportunity to protect those interests, and the agency concurs, the agency must suspend the rulemaking proceeding and convene a separate, more formal proceeding, including referring the matter to the Division of Administrative Hearings (DOAH). Once the separate proceeding concludes, the rulemaking proceeding resumes.¹²

¹ Ch. 120, F.S.

² Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³ Section 120.54, F.S.

⁴ Rule repeals do not require initial rule development. Section 120.54(2)(a), F.S. Emergency rulemaking proceeds separately under s. 120.54(4), F.S.

⁵ Section 120.54(2)(a), F.S. The APA is silent on the initial, internal process an agency follows prior to initiating public rule development. *Adam Smith Enterprises, Inc. v. Dept. of Environmental Regulation*, 553 So. 2d 1260, 1265, n. 4 (Fla. 1st DCA 1990).

⁶ An agency must conduct public workshops if so requested in writing by any affected person unless the agency head explains in writing why a workshop is not necessary. Section 120.52(c), F.S.

⁷ Section 120.52(c), F.S.

⁸ Section 120.54(3)(a)1., F.S.

⁹ Persons affected by the proposed rule have 21 days from the date of publication to request a hearing on the proposed rule. Section 120.54(3)(c), F.S. Those wanting to submit a lower cost regulatory alternative to the proposed rule have the same 21 day time limit. Sections 120.54(3)(a)1., 120.54(1)(a), F.S. The agency must wait at least 28 days from the date of publication before filing the proposed rule for final adoption. Section 120.54(3)(a)2., (3)(e)1., F.S.

¹⁰ Section 120.54(3)(a)1., F.S.

¹¹ Section 120.54(3)(c)1., F.S.

¹² Section 120.54(3)(c)2., F.S.

Subsequent to the final rulemaking hearing, if the agency makes any substantial change to the proposed rule, the agency must provide additional notice and publish a notice of change in the F.A.R. at least 21 days before the rule may be filed for adoption.¹³ If the change increases the regulatory costs of the rule, the agency must revise its SERC.¹⁴

Statement of Estimated Regulatory Costs (SERC)

According to s. 120.541(2), F.S., a SERC is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule. Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule,¹⁵ but are required to prepare a SERC if:

- The proposed rule will have an adverse impact on small businesses;¹⁶
- The proposed rule is likely to directly or indirectly increase aggregate regulatory costs by more than \$200,000 in the first year after the rule is implemented;¹⁷ or
- If a substantially affected person submits a proposal for a lower cost regulatory alternative to the proposed rule. The proposal must substantially accomplish the same objectives in the law being implemented by the agency.¹⁸

Each SERC, at a minimum, must contain the following elements:

- An economic analysis of the proposed rule's potential direct or indirect impacts,¹⁹ including whether any of the following exceed an aggregate of \$1,000,000 in the first five years after implementing the rule:
 - Any adverse impact on economic growth, private sector job creation or employment, or private sector investment;²⁰
 - Any adverse impact on business competitiveness (including the ability to compete with businesses in other states or markets), productivity, or innovation;²¹ or
 - Any likely increase in regulatory costs (including transactional costs).²²
- A good faith estimate of the number and a general description of the individuals and entities required to comply with the rule.²³
- A good faith estimate of the cost of implementing the rule to the agency and any other state or local governmental entities, including any anticipated impacts on state or local revenues.²⁴
- A good faith estimate of the transactional costs members of the public and local governmental entities are likely to incur to comply with the rule.²⁵
- An analysis of the impact of the rule on small businesses, including the agency's explanation for not implementing alternatives which could reduce adverse impacts, and of the impact on small counties and small cities.²⁶

¹³ Section 120.54(3)(d)1., F.S.

¹⁴ Section 120.541(1)(c), F.S.

¹⁵ Section 120.54(3)(b)1., F.S.

¹⁶ Sections 120.54(3)(b)1.a. & 120.541(1)(b), F.S.

¹⁷ Sections 120.54(3)(b)1.b. & 120.541(1)(b), F.S.

¹⁸ Section 120.541(1)(a), F.S. Upon the submission of the lower cost regulatory alternative, the agency must revise its initial SERC, or prepare one if not done previously, and either adopt the proposed alternative or state its reasons for rejecting the proposal.

¹⁹ Section 120.541(2)(a), F.S.

²⁰ Section 120.541(2)(a)1., F.S.

²¹ Section 120.541(2)(a)2., F.S.

²² Section 120.541(2)(a)3., F.S.

²³ Section 120.541(2)(b), F.S.

²⁴ Section 120.541(2)(c), F.S.

²⁵ Section 120.541(2)(d), F.S. The definition of "transactional costs" is discussed later in this analysis.

²⁶ Section 120.541(2)(e), F.S. This statute incorporates the definitions of "small city" and "small county" in ss. 120.52(18) & 120.52(19), F.S., respectively. The statute also incorporates the definition of "small business" in s. 288.703, F.S. *Compare*, s. 120.54(3)(b)2., F.S., which uses similar language requiring agencies to consider the impact of every proposed rule, amendment, or repeal on small businesses, small cities, and small counties but also permits agencies to rely on expanded versions of these definitions if necessary to more adapt the rule for more specific needs or problems. Section 120.54(3)(b)2.a., F.S., specifies 5 methods agencies must consider to reduce the rule's impact on small businesses, cities, and counties. If the agency determines the rule will affect defined

- A description of each lower cost regulatory alternative submitted to the agency with a statement adopting the alternative or explaining the reasons for rejection.²⁷

Additional information may be included if the agency determines it would be useful.²⁸ The agency's failure to prepare a SERC when required or failure to respond to a written proposed lower cost regulatory alternative²⁹ is a material failure to follow the APA rulemaking requirements.³⁰ Consequently, if challenged, the rule could be found to be an invalid exercise of delegated legislative authority.³¹ Even when the agency properly prepares a SERC and responds to all proposed lower cost regulatory alternatives, the resulting rule could be challenged as an invalid exercise of delegated legislative authority if the rule imposes regulatory costs greater than a proposed alternative which substantially accomplishes the same result.³²

The specific SERC requirements found in s. 120.541, F.S., were adopted in 1996 as part of the comprehensive revision of the APA.³³ The revisions resulted from the final report of the Governor's Administrative Procedure Act Review Commission (Commission), which was appointed to study and recommend improvements to the APA, particularly in rulemaking and making agencies more accountable to the Legislature and the public.³⁴ The Commission found the purpose for economic impact statements was to assist both the government and the public in understanding the potential financial impacts of a rule before adoption, but "(t)he quality of economic analyses ... prepared by state agencies is inadequate, and existing law requirements ... are ineffective."³⁵ Although the Commission recommended a number of revisions to improve the evaluation of costs, which serve as the basis for the present statute, these recommendations provided little guidance on the actual cost components relevant to evaluating the potential impact of a proposed rule.³⁶

For example, neither a definition nor examples of "regulatory costs" are found in the APA although the concept is important to an agency's economic analysis. "Transactional costs" are defined as direct costs of compliance, readily ascertainable based on standard business practices, including:

- Filing fees;
- Costs to obtain a license;
- Costs of equipment installed or used for rule compliance;
- Costs of procedures required for compliance;
- Additional operating costs;
- Costs for monitoring and reporting; and

small businesses, notice of the rule must be sent to the rules ombudsman in the Executive Office of the Governor. Section 120.54(3)(b)2.b.(I), F.S. The agency must adopt regulatory alternatives reducing impacts on small businesses timely offered by the rules ombudsman or provide JAPC a written explanation for failing to do so. Section 120.54(3)(b)2.b.(II), (III), F.S.

²⁷ Section 120.541(2)(g), F.S.

²⁸ Section 120.541(2)(f), F.S.

²⁹ The party submitting a proposal to the agency must designate it as a lower cost regulatory alternative or at a minimum discuss cost issues with the proposed rule in order to inform the agency of the purpose of the submittal. A party challenging the validity of a school board rule argued the board failed to prepare a SERC after receiving a lower cost regulatory alternative. The administrative law judge (ALJ) found the proposal submitted to the board neither referenced s. 120.541, F.S., nor asserted it would result in lower costs. The ALJ ruled the failure to demonstrate the proposal presented a lower cost alternative meant the agency was not informed of the purpose of the submission and thus had a duty to prepare a SERC or respond to a lower cost regulatory alternative. *RHC and Associates, Inc. v. Hillsborough County School Board*, Final Order, DOAH Case no. 02-3138RP at <http://www.doah.state.fl.us/ALJ/searchDOAH/> (accessed 1/28/2014).

³⁰ Section 120.541(1)(e), F.S. Unlike other failures to follow the APA rulemaking requirements, this provision prevents the challenged agency from rebutting the presumed material failure by proving the substantial interests of the petitioner and the fairness of the proceedings were not impaired. Section 120.56(1)(c), F.S. This limitation applies only if the challenge is brought by a substantially affected person within one year from the rule going into effect. Section 120.541(1)(f), F.S.

³¹ Section 120.52(8)(a), F.S.

³² Section 120.52(8)(f), F.S. This type of challenge must be to the agency's rejection of a lower cost regulatory alternative and brought by a substantially affected person within a year of the rule going into effect. Section 120.541(1)(g), F.S.

³³ Ch.96-159, s. 11, LOF.

³⁴ *Final Report of the Governor's Administrative Procedure Act Review Commission*, 1 (Feb. 20, 1996), at <http://japc.state.fl.us/research.cfm> (accessed 1/29/2014).

³⁵ *Final Report of the Governor's APA Review Commission*, supra at 31.

³⁶ *Final Report of the Governor's APA Review Commission*, supra at 32.

- Any other necessary costs of compliance.³⁷

The statute does not provide guidance or reference on how agencies are to identify and apply standard business practices in the development of required SERCs. As a result, some agencies with access to, and familiarity with, cost impact data from entities affected by specific rules provide comprehensive analyses of such impacts in SERCs.³⁸ Other agencies, less familiar with costs to individuals and entities to conduct the regulated activities and comply with specific rules, prepare SERCs which do not reflect the full impact of particular rules, particularly when a rule contains delayed impacts.³⁹

Effect of Proposed Changes

The bill creates s. 120.541(5), F.S., to clarify the time frame for which agencies must evaluate costs and impacts when preparing SERCs. The bill specifies that adverse impacts and regulatory costs likely to occur within five years after implementation of a rule include adverse impacts and regulatory costs estimated to occur within five years after the effective date of the rule. The bill also specifies that if any provision of a rule is not fully implemented upon the effective date of the rule, the adverse impacts and regulatory costs associated with such provision must be adjusted to include any additional adverse impacts and regulatory costs estimated to occur within five years after implementation of such provision. The required economic analysis must still analyze the proposed rule's impact on regulatory costs, which will include all costs and impacts estimated in the SERC.

B. SECTION DIRECTORY:

Section 1. Amends s. 120.541, F.S., creating s. 120.541(5), F.S., clarifying the impacts and costs agencies must evaluate when preparing a SERC.

Section 2. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate but likely insignificant fiscal impact on state government. See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

³⁷ Section 120.541(2)(d), F.S.

³⁸ Presentations of Curt Kiser, General Counsel, and Bill McNulty, Economic Analyst, of the Public Service Commission, at scheduled meeting of Rulemaking Oversight & Repeal Subcommittee on November 5, 2013, at http://myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2013111059&committeeID=2727 (accessed 1/31/2014).

³⁹ Presentation of Dept. of Elder Affairs at scheduled meeting of RO&RS on March 27, 2013. *See*, 3-27-2013 Subcommittee Action Packet, 45-52. The agency was revising several rules in Ch. 58A-5, F.A.C., including increased training and testing requirements for administrators, managers, and staff of assisted living facilities (ALF). The SERC prepared by the agency initially concluded the proposed rules would increase regulatory costs by less than \$1,000,000 over the first five years of implementation. However, as adduced by the Subcommittee during the agency's presentation, a number of cost factors were not considered in preparing the SERC, including the time and expense for testing to *all* applicants (not merely those passing the test), increased training and labor costs to ALFs, and even the costs of implementation and operation to the agency. The SERC also did not account for the delayed effective dates for some of the rules, resulting in the agency measuring cost impacts for the first 5 years from the initial effective date of some rules rather than a full 5 years for each rule. When questioned on these assumptions, the agency conceded the SERC should have indicated an overall cost impact exceeding \$1,000,000 for the first 5 years of full implementation of all the subject rules. An audio recording of the meeting is at http://myfloridahouse.gov/FileStores/AdHoc/PodCasts/03_27_2013/Rulemaking_Oversight_Repeal_2013_03_27.mp3 (accessed 1/31/2014).

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is expected to provide a more accurate estimate of the economic impacts of agency rules and better opportunities for local governmental and private entities to participate in rulemaking and in estimating regulatory costs. In addition, more complete estimates of regulatory costs and economic impacts may bring more agency rules under the scrutiny of legislative ratification prior to their becoming effective.

D. FISCAL COMMENTS:

Currently, state agencies are required to comply with notice, publication, and hearing requirements for preparing SERCs. Compliance with the additional requirements created in this bill may require agencies to devote more resources to preparing SERCs, but the impact is likely insignificant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not create any additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.