STORAGE NAME: h1503.gg
DATE: April 10, 2000

HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS

BILL #: HB 1503 (PCB GRR 00-01)

RELATING TO: Administrative Procedure

SPONSOR(S): Committee on Governmental Rules and Regulations (PRC), Representative Wallace and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) GOVERNMENTAL RULES AND REGULATIONS YEAS 6 NAYS 0
(2) JUDICIARY YEAS 8 NAYS 0
(3) GENERAL GOVERNMENT APPROPRIATIONS
(4)
(5)

I. SUMMARY:

HB 1503 creates s. 120.541(1)(c), F.S., to require the preparation of a statement of estimated regulatory costs (SERC) when an agency makes a preliminary estimate of the regulatory costs of implementing and enforcing a proposed administrative rule and of the transactional costs associated with the rule that is greater than $1.5 million annually. Agencies are currently required to prepare a SERC when a person substantially affected by the proposed rule submits a good faith proposal of a less costly alternative to the proposed rule.

The bill also creates s. 120.541(1)(d), F.S., to require the Office of Program Policy Analysis and Government Accountability (OPPAGA) to review and comment on each SERC prepared pursuant to s. 120.541(1)(c), F.S. Such comments shall be made prior to the filing of the rule for adoption, but the failure of OPPAGA to provide comments on a SERC may not be grounds for a rule challenge. The bill creates s. 11.516, F.S., to require OPPAGA to review and comment on each SERC prepared under s. 120.541(1)(c), F.S. OPPAGA must provide commentary on improving the methodologies used to prepare the SERC's to the agency and the Joint Administrative Procedures Committee.

The bill creates the Regulatory Sunrise Act. It defines the term "regulation" and establishes factors that must be addressed when a bill that proposes to regulate a business or professional activity not currently being regulated by the state is under consideration by the Legislature. This review is similar in concept to s. 11.62, F.S., (the Sunrise Act), which provides for substantial fact-finding by the Legislature when it considers legislation that will regulate a profession or occupation not currently regulated by the state.

The bill also amends s. 120.52(1)(b), F.S., to clarify which state agencies are subject to the provisions of the Administrative Procedures Act.

The bill appears to have a minimal fiscal impact on state government.

The bill has an effective date of October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

B. PRESENT SITUATION:

Benefit/Cost Analysis of Proposed Legislation

The State of Florida

Section 11.62, F.S., requires that when legislation proposes to regulate a profession or occupation not currently regulated by the state, a legislative report must be prepared to address certain factors concerning the proposed regulation, and requires certain groups interested in the proposed regulation to provide information to the Legislature. The statute only pertains to the regulation of professions or occupations; the Legislature is not required to conduct this type of review for regulation of businesses or regulation of other activities.

The federal government

The United States Congress does not appear to conduct any formal benefit/cost analysis on proposed legislation. Much of the literature reviewed by staff of the Committee on Governmental Rules and Regulations consisted of criticisms of the lack of a macro view of regulatory impacts, examples of the burdens imposed upon businesses and professions, and prescriptions to cure the malady. Several research groups have begun to supply real-time critiques of legislation proposing additional regulation or of administrative rules that would impose additional regulatory requirements.

Other state governments

It does not appear that other states conduct a benefit/cost analysis of legislation that proposes to regulate a profession or business.

Benefit/Cost Analysis of Proposed Administrative Rules

State of Florida

The Governor's 1995 Administrative Procedure Act Review Commission recommended that the "Economic Impact Statement" provided in then current law be replaced with a simpler and more meaningful "Statement of Estimated Regulatory Costs." Section 120.541, F.S., provides for a statement of estimated regulatory costs associated with a proposed administrative rule. It provides that any substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative. The person must submit the proposal within 21 days of the notice of adoption, amendment or repeal of a rule. The proposal may include

the alternative of not adopting a rule, but it must include an explanation of how the lower costs and objectives of the law will be achieved by not adopting any rule.

When a lower cost regulatory alternative is presented to an agency, the agency must prepare a statement of estimated regulatory costs and either adopt the alternative or provide reasons for rejecting the alternative in favor of the proposed rule. Failure of the agency to prepare or revise the statement of estimated regulatory costs is a material failure to follow the applicable rulemaking procedures or requirements provided in Chapter 120, F.S. The agency must provide the statement to the person submitting the alternative and to the public prior to filing the rule for adoption.

A rule may not be declared invalid because it imposes regulatory costs that could be reduced by the adoption of less costly alternatives. In addition, a rule may not be declared invalid based upon a challenge to the agency's statement of estimated regulatory costs unless: the issue is raised within one year of the effective date of the rule; the substantial interests of the person challenging the agency's rejection of the lower cost alternative is materially affected; and the agency fails to prepare or revise the statement as required, or the challenge is to the agency's rejection of the lower cost alternative.

The statement of estimated regulatory costs must include:

- A good faith estimate of the number of persons or entities likely to be required to comply with the rule, along with a general description of the types of individuals the rule will likely affect;
- A good faith estimate of the cost to an agency and other state and local government entities of implementing and enforcing the rule and any anticipated effect on state or local revenues;
- A good faith estimate of the "transactional costs" likely to be incurred by the regulated public and local government. Transactional costs are direct costs to a regulated person including filing fees, cost of licensing, the cost of equipment, operating costs, and the cost of monitoring and reporting;
- An analysis of the impact on small businesses, small counties and small cities;
- Any additional information that the agency determines to be useful; and
- A description of any good faith written proposal submitted by a regulated person and a statement adopting the proposal or a statement of the reasons for rejecting the proposal.

The table below provides historical information on the number of rules for which a SERC was prepared.

Year	Total No. of Rules	No. of rules with SERC	Percent
1997	4365	188	4.3%
1998	4597	187	4.1%
1999	2477	104	4.2%

Office of Program Policy Analysis and Government Accountability (OPPAGA) Study

OPPAGA conducted a study of the issue of government regulatory costs pursuant to proviso language in ch. 98-422, Laws of Florida.[1] The proviso language required OPPAGA to prepare a study that:

- Proposes methodologies for and the time and resources needed to estimate state agencies' costs of administering regulatory programs and activities (administrative costs) and businesses' costs in complying with those programs and activities (compliance costs.) These costs are to be further categorized into the costs of regulations designed to protect individual and societal health and safety (social regulatory costs) and those designed to regulate the market place (economic regulatory costs). In each of these categories, the cost of paperwork is to be separately identified;

- Proposes methodologies for establishing benefit/cost considerations in rulemaking and estimates the resources and time required to implement these methodologies; and

- Provides a comprehensive bibliography of published regulatory cost studies.

OPPAGA concluded that conducting a study of the cost of state regulation is feasible but would likely require significant effort and cost. OPPAGA suggested that if the Legislature determines that such a study is necessary, the Governor's Office should be directed to contract with a private consultant with experience and expertise in conducting large-scale surveys and economic analyses. The report also provided several alternatives to this study and suggested that the current statement of estimated regulatory costs be required only when a certain threshold is reached. It also suggested that s. 11.62, F.S., the Sunshine Act, be expanded to cover not only the regulation of new professions or occupations, but to mandate the application of the act when the Legislature proposes to impose new regulation on a profession or occupation already regulated, or when it enacts regulatory law that affects other entities.

The federal government

The federal government addresses the process of regulatory review in a piecemeal fashion. Presidents have attempted over the last twenty years to provide more oversight and review of existing and proposed federal regulation through the issuance of executive orders. These executive orders sought to streamline existing regulation and to provide in-depth economic analysis of proposed regulation. It is through executive orders that federal agencies are directed to prepare an impact statement for proposed regulations that will have an annual impact that is greater than ten million dollars. These orders have had marginal success in reforming regulation.

C. EFFECT OF PROPOSED CHANGES:

Definition of Agency

The definition of agency is revised to clarify which public entities are subject to the Administrative Procedures Act (APA). This revision addresses a concern of certain local public

[1] Office of Program Policy Analysis and Government Accountability (OPPAGA), *Estimating the Cost of State Regulatory Programs and Activities: Possible Approaches*, Report 98-78 (April 1998).

authorities, such as port or airport authorities, which operate within one county. The Attorney General interpreted the definition narrowly, stating in part:

> Units of local government having jurisdiction only in one county or part thereof and which are not intergovernmental or regional agencies or programs described in [s. 120.52](1)(b), F.S.], are subject to the provisions of this chapter, only if expressly made subject thereto by special or general legislative act or an existing judicial decision. Op.Atty.Gen., 077-142, (Dec. 30, 1977).

The definition of agency was amended in 1999 for clarity. It had previously been a run-on sentence incorporating over twenty types of public agencies. The definition found in s. 120.52(1), F.S., now reads:

(1) "Agency" means:
(a) The Governor in the exercise of all executive powers other than those derived from the constitution.
(b) Each:
1. State officer and state department, and each departmental unit described in s. 20.04.
2. Authority, including a regional water supply authority.
3. Board.
4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
5. Regional planning agency.
6. Multicounty special district with a majority of its governing board comprised of nonelected persons.
7. Educational units.
8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.
© Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), F.S., unless any party to such agreement is otherwise an agency as defined in this subsection, or any multi county special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

Certain local public authorities believe that the amended definition of “agency” supersedes the Attorney General’s interpretation, thereby making local public authorities subject to the APA.

The bill revises the definition of “Agency” to insert the word “state” in the introductory phrase of s. 120.52(1)(b), F.S., thereby modifying the subsections that follow. This change is designed to clarify that the APA applies to those state agencies listed in the definition and those agencies for which the provisions of the APA are otherwise expressly applied.

Mandatory SERC

The bill creates ss. 120.541(1)(c) and (d), F.S., which mandate the preparation of a SERC when an agency makes a preliminary estimate of the costs of implementing and enforcing a proposed administrative rule and of the transactional costs associated with the rule that is greater than $1.5 million annually, and directs OPPAGA to review and comment on these SERC’s prior to the filing of the rule for adoption. Failure by OPPAGA to provide comments on the SERC may not be grounds for a rule challenge.

OPPAGA.

Section 11.516, F.S., requires OPPAGA to review and comment on SERC's created under s., 120.541(1)(c), F.S., and to provide comments on the methodologies of these SERC's to the agency and the Joint Administrative Procedures Committee.

Legislative Review of Proposed Regulation.

The bill creates the Regulatory Sunrise Act. It defines the term "regulation" to mean authority granted a state agency, as defined by s. 120.52, F.S., to regulate a business or professional activity not currently being regulated, which will require the agency to adopt administrative rules pursuant to Chapter 120, F.S., to implement, operate, or enforce.

The bill provides factors to be addressed when a regulatory bill is under consideration by the Legislature. These factors include:

- Whether the public health, safety, and welfare are promoted by the proposed regulation;
- Whether the public is or can be effectively protected by other means;
- Whether the overall cost effectiveness and economic interest of the proposed regulation will be favorable, taking into consideration good faith estimates of the number of individuals and entities likely affected, the cost to state agencies and local governments of implementing and operating the proposed regulation, and the direct costs to regulated individuals and entities of complying with the proposed regulation; and
- Whether the proposed regulation will impact on small businesses, counties, and cities.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 120.52(1)(b), F.S., to clarify the definition of state agency.

Section 2. Creates ss. 120.541(c) & (d), F.S., mandating the preparation of a SERC under certain conditions; and requiring review and comment of these statements by OPPAGA prior to the filing of the rule for adoption. Also provides that the failure of OPPAGA to make comments on a SERC may not be grounds for a rule challenge. Also clarifies the basis for invalidity of a rule based on the rejection of a lower cost regulatory alternative.

Section 3. Creates s. 11.516, F.S., requiring OPPAGA to review the methodologies and to provide comments on a SERC prepared pursuant to s. 120.541(1)(c), F.S., to the agency and the Joint Administrative Procedures Committee.

Section 4. Creates the Regulatory Sunrise Act; requiring the Legislature to consider specific factors in determining whether to implement a proposed regulation.

Section 5. Provides that the act takes effect October 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Minimal (See Fiscal Comments)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Although the agencies would have to prepare the SERC when reaching the $1.5 million threshold for annual costs, the additional number of SERCs produced should be few and the additional costs to the State should be minimal.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require the counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

The bill would mandate a SERC in certain circumstances and require OPPAGA to review and comment on each SERC. The bill does not provide additional rulemaking authority nor does it create a basis for administrative challenge within the rule adoption process.

C. OTHER COMMENTS:

It is unclear why the bill creates ss. 120.541(1)(d) and 11.516, F.S. Both empower OPPAGA to review and comment on SERC's prepared under s. 120.5412(1)(c), F.S. It would seem that one statutory authorization would be sufficient direction to OPPAGA in that regard. Moreover, s. 120.541(1)(d), F.S., requires OPPAGA to review a SERC prior to the filing of a rule for adoption, but s. 11.516, F.S., does not require review of a SERC before the rule is filed for adoption. Finally, s. 120.541(1)(d) provides that the failure of OPPAGA to provide comments on a SERC may not be used as grounds for a rule challenge, while s. 11.516, F.S., is silent on this issue but requires OPPAGA to review the methodologies of SERC's and to comment thereon to the agency and the Joint Administrative Procedures Committee. These two sections should be consolidated to avoid confusion regarding their effects.

Moreover, by having OPPAGA review and comment on the substance of each SERC under s. 120.541(1)(d), F.S., the bill may allow a party to a rule challenge to attempt to offer documents that contain the comments, to the extent that the comments become public records.[2] If the Legislature intends for OPPAGA to comment on the substance of executive branch agency SERC's, an evidentiary exception for such comments may be in order to prohibit their introduction in administrative litigation. In addition, the language in proposed s. 11.516, F.S., requires OPPAGA to review the underlying methodologies used in formulating a SERC, and this language might have the same effects as the "comment and review" language of s. 120.541(1)(d), F.S.

The bill's redefinition of "agency" in s. 120.52(1)(b), F.S., for purposes of the Administrative Procedures Act to various "state" entities, while intended to clarify that certain local public authorities are exempt from the Act, may change the scope of the Act. For example, the modification may call into question whether school boards are "state" entities. It may be clearer to list those entities that are or should be specifically exempt from the Act in s. 120.52(1)(c), F.S.

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[2] Section 120.569(2)(f), F.S., prohibits an administrative law judge or other "presiding officer" from issuing "any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee." It would be a question of law whether the duties imposed by the bill on OPPAGA amount to "legislative duties" within the meaning of s. 120.569(2)(f), F.S. Moreover, if the comments of OPPAGA were collected in a report and disseminated to agencies and the JAPC, that document would likely be a public record.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:	Staff Director:
David M. Greenbaum	David M. Greenbaum

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
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AS FURTHER REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

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