

STORAGE NAME: h1503.grr

DATE: February 25, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
ANALYSIS**

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

RELATING TO: Administrative Procedure

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

TIED BILL(S):

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

- (1) GOVERNMENTAL RULES AND REGULATIONS YEAS 6 NAYS 0
 - (2)
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I. SUMMARY:

PCB GRR 00-01 creates s. 120.541(1)(c) to make mandatory the preparation of a SERC when an agency makes a preliminary estimate of regulatory costs that is greater than \$1.5 million annually. Agencies are currently required to prepare a statement of estimated regulatory costs (SERC) when a person substantially affected by the proposed rule submits a good faith proposal of a less costly alternative to the proposed rule.

This bill also creates s. 120.541(1)(d) to require the Office of Program Policy Analysis and Government Accountability (OPPAGA or Office) to comment upon each SERC prepared pursuant to Fla. Stat. s. 120.541(3). Such comments shall be made prior to the filing of the rule for adoption. Additionally, s. 11.513 is created to provide the Office with the authority to review and comment on each SERC prepared under s. 120.541(1)(c). The Office is also to provide commentary on improving the methodologies used to prepare the statements.

The PCB creates the Regulatory Sunrise Act. It defines the term "regulation" and provides for 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 before the Legislature. This review is similar in concept to Fla. Stat. s. 11.62, the Sunrise Act, which provides for substantial fact-finding by the Legislature when considering legislation that proposes to regulate a profession or occupation not currently regulated by the State.

The PCB also amends Fla. Stat. s. 120.52(1)(b), the definition of agency, to clarify which state agencies are subject to the provisions of the Administrative Procedure Act.

The PCB has a minimal fiscal impact and becomes effective October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

The PCB would mandate the production of a statement of estimated regulatory costs (SERC) for each proposed rule that the adopting agency estimates would have an annual cost greater than \$1.5 million. While production of the SERC will increase the amount of work done by state agencies in preparing to adopt an administrative rule, the statement could result in a decrease in the level of regulation through the discussion of alternative methods of regulation.

B. PRESENT SITUATION:

Benefit/Cost Analysis of Proposed Legislation

The State of Florida. Fla. Stat. s. 11.62, the Sunrise Act, provides that when legislation proposes to regulate a profession or occupation not currently regulated by the State, a legislative report is to be produced addressing certain factors concerning the proposed regulation, and information is to be provided to the Legislature by certain groups interested in the proposed regulation. 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 committee staff consists 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." Fla. Stat. s. 120.541, provides for a statement of estimated regulatory costs. 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. 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) 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;
- b) 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;
- c) 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;
- d) an analysis of the impact on small businesses, small counties and small cities;
- e) any additional information that the agency determines to be useful; and
- f) 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.

| <u>Year</u> | <u>Total No. of Rules</u> | <u>No. of rules with SERC</u> | <u>Percent</u> |
|-------------|---------------------------|-------------------------------|----------------|
| 1997 | 4365 | 188 | 4.3% |
| 1998 | 4597 | 187 | 4.1% |
| 1999 | 2477 | 104 | 4.2% |

Attachment One is a SERC prepared during the rule adoption process for ch 46-53, Fla. Admin. Code (transferred to ch. 68B-53, Fla. Admin. Code) relating to the harvesting of calico scallops. This SERC is quite extensive and may not be indicative of the level of analysis in most SERCs. Attachment Two is another example that may be more indicative of the level of analysis usually found in a SERC.

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:

1. 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;
2. proposes methodologies for establishing benefit/cost considerations in rulemaking and estimates the resources and time required to implement these methodologies; and
3. provides a comprehensive bibliography of published regulatory cost studies.

The Office concluded that conducting a study of the cost of state regulation is feasible but would likely require significant effort and cost. If the Legislature determines that such a study is necessary, then 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 Fla. Stat. s. 11.62, 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.

In response to the rising tide of criticism on the issue of the expansive nature of federal regulation, Congress has, over the last several years, added to specific statutes language requiring greater economic assessment or the use of benefit/cost analysis in the promulgation of new rules. Attachment Three describes some of the recent federal regulatory reform legislation.

Other state governments. Most states conduct some form of review of proposed regulations. Attachment Four describes the status of rule review in the federal government and among the states.² Attachment Five is a listing of the states that conduct a review of proposed legislation and each state's statutory requirements for that review.³

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).

² Robert W. Hahn, AEI-Brookings Institute Joint Center for Regulatory Studies, *State and Federal Regulatory Reform: A Comparative Analysis*, Working Paper 98-3 at App. A4 (November 1998).

³ *Id.* at App. A1

C. EFFECT OF PROPOSED CHANGES:

Definition of Agency. The definition of agency is revised to clarify which public entities are controlled by the Administrative Procedure Act (APA). This revision addresses a concern of certain local public authorities, such as port or airport authorities, which operate within one county. The Attorney General interpreted this definition in an opinion that stated 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 subsec. [s. 120.52](1)(b), 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 opinion essentially said that the definition, read in total, speaks to state entities included within the definition of agency. The concern of local public authorities is that the definition, as amended in 1999⁴, appeared to void the Attorney General's interpretation of the definition and thereby make these local public authorities subject to the APA.

The definition is revised to insert the word "state" in the introductory phrase of Fla. Stat. s. 120.52(1)(b), allowing that word to modify the subsections that follow. This change would appear to clarify the intent of the APA to subject only to its provisions state agencies, other public agencies expressly listed in the definition, and those agencies for which the provisions of the APA are expressly applied.

Mandatory SERC. The bill mandates the preparation of a SERC when an agency makes a preliminary estimate of regulatory costs of a proposed administrative rule greater than \$1.5 million annually. The bill also directs OPPAGA to comment upon these SERCs.

OPPAGA. OPPAGA would be required to comment upon each SERC prepared pursuant to this act. Such comments shall be made prior to the filing of the rule for adoption. Additionally, the act

⁴ The section (b) of the definition of agency was amended in 1999 for clarity. It had previously been aC:\DATA\WP61\pcb01a.grr run-on sentence incorporating over twenty types of public agencies. The definition found in Fla. Stat. s. 120.52(1) 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.

(c) 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), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

provides OPPAGA with the authority to review and comment on each SERC prepared pursuant to this act. OPPAGA is also to provide commentary on improving the methodologies used to prepare the statements.

Legislative Review of Proposed Regulation. The bill creates the Regulatory Sunrise Act. It defines the term regulation and provides for factors that must be addressed when the bill is under consideration before 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 Fla. Stat. s. 120.52(1)(b) to clarify the definition of state agency.

Section 2. Creates ss. 120.541(c) & (d); mandates the preparation of a SERC under certain conditions; and provides for review and comment of these statements by OPPAGA.

Section 3. Creates s. 11.516; provides authority to OPPAGA to review and comment upon a SERC prepared pursuant to s. 120.541(1)(d).

Section 4. Creates the Regulatory Sunrise Act.

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:

N/A

2. Expenditures:

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.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

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 the OPPAGA to comments on those documents. The bill does not provide additional rulemaking authority nor does it create a basis for administrative challenge within the rule adoption process.

STORAGE NAME: h1503.grr

DATE: February 25, 2000

PAGE 8

C. OTHER COMMENTS:

N/A

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