

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: CS/SB 1060

INTRODUCER: Banking and Insurance Committee and Senator Simmons

SUBJECT: Legislative Ratification

DATE: March 11, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<b>Fav/CS</b>
2.	_____	_____	<u>FP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1060 exempts from ratification under s. 120.541(3), F.S., all rules adopting maximum reimbursement allowances and manuals for workers' compensation medical treatment and care approved by the Three Member Panel (panel). The panel adopts uniform schedules of maximum reimbursement allowances for medically-necessary treatment, care, and attendance provided by physicians, hospitals, ambulatory surgical centers, work-hardening programs, pain programs, and durable medical equipment. The Division of Workers' Compensation (division) of the Department of Financial Services undertakes administrative rulemaking in order to adopt each manual containing the uniform schedules of maximum reimbursement allowances established by the panel. Typically, the three-member panel adopts by reference a manual of policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers.

The Florida Administrative Procedure Act (APA) requires state agencies to assess whether a Statement of Estimated Regulatory Cost (SERC) must be prepared in conjunction with the promulgation of an administrative rule. The preparation of a SERC is required if a proposed rule will have an adverse impact on small business, or if it is likely to increase directly or indirectly regulatory costs by more than \$200,000 within one year of implementation. If the SERC analysis indicates the rule is likely to have a specific economic impact exceeding \$1 million aggregated in the first 5 years from implementation, then the rule must be ratified by the Legislature before going into effect. The APA requires that the rule be submitted to the President of the Senate and

the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

## II. Present Situation:

### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>1</sup> Rulemaking authority is delegated by the Legislature<sup>2</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>3</sup> a rule. Agencies do not have discretion as to whether to engage in rulemaking.<sup>4</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>5</sup> The grant of rulemaking authority itself need not be detailed.<sup>6</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>7</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule,<sup>8</sup> which is published by the Department of State in the Florida Administrative Register.<sup>9</sup> The notice must provide certain information, including the text of the proposed rule, and a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared. The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>10</sup>

The economic analysis, mandated for each SERC, must analyze a rule’s potential impact over the 5-year period after the rule goes into effect. First discussed in the analysis is the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>11</sup> Next is the likely adverse impact on business competitiveness,<sup>12</sup> productivity, or innovation.<sup>13</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>14</sup> If the analysis shows the projected impact of the

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

<sup>2</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>3</sup> Section 120.52(17), F.S.

<sup>4</sup> Section 120.54(1)(a), F.S.

<sup>5</sup> Sections 120.52(8) & 120.536(1), F.S.

<sup>6</sup> *Save the Manatee Club, Inc.*, *supra* at 599.

<sup>7</sup> *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>8</sup> Section 120.54(3)(a)1, F.S.

<sup>9</sup> Section 120.55(1)(b)2, F.S.

<sup>10</sup> Section 120.541(2)(a), F.S.

<sup>11</sup> Section 120.541(2)(a)1., F.S.

<sup>12</sup> This factor includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>13</sup> Section 120.541(2)(a) 2., F.S.

<sup>14</sup> Section 120.541(2)(a) 3., F.S.

proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5-year period, the rule cannot go into effect until ratified by the Legislature.<sup>15</sup>

Current law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>16</sup> A rule must be filed for adoption before it may go into effect<sup>17</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>18</sup> A rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, thus a rule must be filed for adoption before being submitted for legislative ratification.

### **Workers’ Compensation Medical Benefits**

For work-related injuries sustained by employees, workers’ compensation provides medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment, and prosthetics.<sup>19</sup> The Division of Workers’ Compensation of the Department of Financial Services administers the regulation of the workers’ compensation system pursuant to ch. 440, F.S. The division administers and regulates many aspects of the health care delivery system, but does not establish the reimbursement formulas and methodologies for the compensation of providers and facilities that deliver medical services.

### **Schedules of Maximum Reimbursement Allowances**

The Three-Member Panel (panel) is required to determine and adopt schedules of maximum reimbursement allowances for medically necessary treatment, care, and attendance provided by physicians, hospitals, ambulatory surgical centers, work-hardening programs, pain programs, and durable medical equipment. An individual physician, hospital, ambulatory surgical center, pain program, or work-hardening program must be reimbursed either by the agreed-upon contract price or the maximum reimbursement allowance in the appropriate schedule.<sup>20</sup>

The Three-Member Panel (panel) consists of the Chief Financial Officer, or the Chief Financial Officer’s designee, and two members appointed by the Governor, subject to confirmation by the Senate.<sup>21</sup> One member appointed by the Governor is a representative of employers and the other Governor’s appointee is a representative of employees.

The Division of Workers’ Compensation (division) of the Department of Financial Services presents recommendations to the panel on reimbursement and policy changes to the Health Care Provider Reimbursement Manual, Hospital Reimbursement Manual, and the Ambulatory Surgical Center Reimbursement Manual. The panel receives public comment on the proposed changes and either adopts the recommendations, amends the recommendations, or does not

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<sup>15</sup> Section 120.541(3), F.S.

<sup>16</sup> Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>17</sup> Section 120.54(3)(e)6, F.S.

<sup>18</sup> Section 120.54(3)(e), F.S.

<sup>19</sup> Section 440.13(2)(a), F.S.

<sup>20</sup> Section 440.13(12), F.S.

<sup>21</sup> Section 440.13(12)(a), F.S.

accept them. The panel's recommendations are implemented within each respective reimbursement manual.

The division undertakes rulemaking pursuant to ch. 120, F.S., in order to adopt each manual. The division includes the uniform schedules of maximum reimbursement allowances established by the panel in these rules. The division publishes the uniform schedules of maximum reimbursement allowances within the reimbursement manuals incorporated by reference into the rules. The division has taken the position that the rules incorporating the reimbursement manuals are subject to legislative ratification despite the statutory authority given to the Three-Member Panel to determine maximum reimbursement allowances and despite the explicit provisions that dictate the amount of reimbursement payable to various health care providers contained in s. 440.13(12), F.S.<sup>22</sup>

The division has adopted rules, as described below, providing for the maximum reimbursement allowances of health care providers, hospitals, and ambulatory surgical centers.

**Health Care Providers.** This manual<sup>23</sup> provides reimbursement policies and a schedule of maximum reimbursement allowances (MRA), for licensed physicians, licensed health care providers, licensed pharmacists and medical suppliers rendering medical services and supplies to Florida's injured workers.

**Hospitals.** This manual<sup>24</sup> contains the MRAs and establishes policy, procedures, principles and standards for implementing statutory provisions regarding reimbursement for medically necessary services and supplies provided to injured workers in a hospital setting.

**Ambulatory Surgical Centers.** This manual<sup>25</sup> contains the MRAs for surgical procedures performed in an ambulatory surgical center setting and defines a payment method for surgical and non-surgical services not defined in the fee schedule.

In 2015, the panel recommended that the reimbursement manuals should be exempt from the legislative ratification requirements of ch. 120, F.S.<sup>26</sup> The panel asserts that s. 440.13(12), F.S., already provides statutory authority to the panel to establish maximum reimbursement allowances and contains specific provisions on reimbursement amounts that are payable to health care providers.

Rule ratification can result in delays in the implementation of revised fee schedules. Delays in the adoption of fee schedules can result in the schedules becoming outdated and not representative of the marketplace. According to the division, requests for rule ratifications of the Health Care Provider Reimbursement Manual were submitted to the Legislature in 2012, 2013,

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<sup>22</sup> Department of Financial Services Analysis of Senate Bill 1060 (March 5, 2015) (on file with Banking and Insurance Committee).

<sup>23</sup> Rule 69L-7.020, F.A.C.

<sup>24</sup> Rule 69L-7.501, F.A.C.

<sup>25</sup> Rule 69L-7.100, F.A.C.

<sup>26</sup> Three-Member Panel Biennial Report, 2015 Edition.

and 2014. In 2013, legislation<sup>27</sup> was filed to ratify the manual; however, it failed to become law.<sup>28</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 120.541, F.S., to include a provision exempting DFS's promulgation of rules adopting maximum reimbursement allowances and manuals from the legislative ratification requirement of s. 120.541(3), F.S. As a result, maximum reimbursement allowances and manuals promulgated by DFS in the future would not require legislative ratification before taking effect, even if the associated regulatory costs exceed the one million dollar threshold.

**Section 2** provides the bill will take effect July 1, 2015.

### IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

### V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If the fee schedules and manuals are exempt from rule ratification, this could result in reimbursement rates for providers being adopted in a timelier manner and such fees being more representative of the market place.

C. Government Sector Impact:

None.

### VI. Technical Deficiencies:

None.

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<sup>27</sup> HB 1165.

<sup>28</sup> Department of Financial Services Analysis of Senate Bill 1060 (March 5, 2015) (on file with Banking and Insurance Committee).

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 120.80 of the Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance on March 10, 2015:**

The bill clarifies that all rules adopting maximum reimbursement allowances and manuals, which are approved by the three-member panel, are exempt from ratification.

- B. **Amendments:**

None.