

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.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 1640

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Broxson

SUBJECT: Administrative Procedures

DATE: April 21, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	Ferrin	GO	Favorable
2.			JU	
3.			RC	

I. Summary:

SB 1640 requires an agency to prepare a statement of estimated regulatory cost each time an agency makes, amends or repeals a rule.

The bill has a July 1, 2017, effective date.

II. Present Situation:

Rulemaking Authority

A rule is an “agency statement of general applicability that implements, interprets, or prescribes law or policy.”¹ Rulemaking authority is delegated by the Legislature in law to an agency, and authorizes an agency to adopt, develop, establish, or otherwise create a rule.² An agency may not engage in rulemaking unless it has a legislative grant of authority to do so.³ The statutory authority for rulemaking must be specific enough to guide an agency’s rulemaking and an agency rule must not exceed the bounds of authority granted by the Legislature.⁴

Prior to the adoption, amendment, or repeal of any rule, an agency must file a notice of the proposed rule in the Florida Administrative Register.⁵ The notice of the proposed rule must include:

- An explanation of the purpose and effect;
- The specific legal authority for the rule;

¹ Section 120.52(16), F.S.

² Section 120.52(17), F.S.

³ See ss. 120.52(8) and 120.536, F.S.

⁴ See *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26 (Fla. 1st DCA 2008) and *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla 1st DCA 2000).

⁵ See ss. 120.54(2)(a) and 120.55(1)(b), F.S.

- The full text of the rule; and
- A summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared.⁶

Within 21 days of the notice, a person who is substantially affected by the agency’s proposed rule may provide an agency with supplementary information regarding the SERC or provide proposals for a lower cost regulatory alternative to the proposed rule.⁷ These lower cost regulatory alternatives must “substantially accomplish the objectives of the law” the agency is trying to implement through rulemaking.⁸ If someone submits a proposed lower cost alternative, the agency has the option of revising its SERC or creating a SERC (if one has not already been created).⁹

When an Agency Must Prepare a SERC

Agencies are “encouraged” to prepare SERCs before a rule is adopted, amended or repealed, however, this is not a requirement.¹⁰ Agencies are required to prepare SERCs in two circumstances: when the agency receives a lower cost alternative and if the agency believes that a proposed rule will have a fiscal impact under certain circumstances.

First, agencies must prepare a SERC when a person who is substantially affected by a proposed rule submits “a good faith written proposal for a lower cost regulatory alternative to the proposed rule.”¹¹ The lower cost regulatory alternative must accomplish objectives of the law the agency is trying to implement.¹² The lower cost alternative may also argue that the agency does not need to adopt a rule in order to implement the law.¹³

Second, agencies must prepare the SERC for a proposed rule if the agency believes that the proposed rule meets one of the following criteria:

- The proposed rule has an adverse impact on small businesses; or
- The proposed rule is likely to increase regulatory costs more than \$200,000 within one year after implementation. This \$200,000 threshold includes both direct and indirect regulatory costs.¹⁴

Agencies must revise their SERCs under certain circumstances if a rule is modified or revised.¹⁵

SERC Requirements

A SERC must include estimates of:

- The number of people and entities affected by the proposed rule;

⁶ Section 120.54(3)(a)1., F.S.

⁷ See ss. 120.54(3)(a)1., and 120.541(1)(a), F.S.

⁸ Section 120.541(1)(a), F.S.

⁹ Section 120.541(1)(a), F.S.

¹⁰ Section 120.54(3)(b), F.S.

¹¹ Section 120.541(1)(a), F.S.

¹² Section 120.541(1)(a), F.S.

¹³ Section 120.541(1)(a), F.S.

¹⁴ Sections 120.54(3)(b), and 120.541(1)(b), F.S.

¹⁵ Section 120.541(1)(c), F.S.

- The cost to the agency and other governmental entities to implement the proposed rule;
- Transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule’s impact on small businesses, counties, and cities.¹⁶

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of \$1 million within the first five years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness,¹⁷ productivity, or innovation; or
- Regulatory costs, including any transactional costs.¹⁸

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within five years after implementation of the rule, then the Legislature must ratify the rule in order for it to take effect.¹⁹

SERCs Prepared by Agencies

The following chart shows the number of rules which agencies proposed, as well as the number of SERCs that are prepared and reviewed by the Joint Administrative Procedures Committee.²⁰

Year	Number of Proposed Rules	Number of SERCs	Percentage of Proposed Rules which Required SERCs
2016	1,918	44	2%
2015	2,851	57	2%
2014	1,771	153	8.6%
2013	2,795	391	14%
2012	2,382	334	14%

III. Effect of Proposed Changes:

The bill requires an agency to prepare SERCs before adopting, amending or repealing any rule, other than emergency rules. The bill requires agencies to revise their SERCs if someone submits a lower cost regulatory alternative to the agency.

¹⁶ Section 120.541(2)(b)-(e), F.S. A small city has an unincarcerated population of 10,000 or less. A small county has an unincarcerated population of 75,000 or less. A small business employs less than 200 people, and has a net worth of \$5 million or less.

¹⁷ Business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

¹⁸ Section 120.541(2)(a), F.S.

¹⁹ Section 120.541(3), F.S. Legislative ratification is not required for adoption of federal standards, amendments to the Florida Building Code, or amendments to the Florida Fire Prevention Code. See s. 120.541(4), F.S.

²⁰ Email from Ken Plante, JAPC Coordinator, dated April 20, 2017, on file with the Senate Committee on Governmental Oversight and Accountability.

The bill has a July 1, 2017, effective date.

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:

Indeterminate.

C. Government Sector Impact:

Indeterminate. Some agencies stated that this bill would have a negative impact on their ability to carry out their statutory duties because of the staff time it would take to prepare SERCs for every proposed rule. The majority of agencies stated that they would not be adversely impacted.²¹

VI. Technical Deficiencies:

The bill requires an agency to prepare a SERC even when it is unclear that a revision or repeal of a rule will have a fiscal or regulatory impact. For example, a rule may revise a form, and would be unlikely to have a fiscal or regulatory impact. In addition, this bill may have the effect of requiring an agency to prepare SERCs when the agency rule itself does not have any effect on

²¹Several agencies have provided bill analyses for a similar bill, HB 1163. The following agencies reported that they were neutral on the bill or would not be adversely impacted: Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Statewide Guardian Ad Litem Office, Division of Administrative Hearings, Office of Legislative Services, Office of Financial Regulation, Auditor General, Department of Economic Opportunity, Agency for Persons with Disabilities, Department of Financial Services, and Agency for State Technology. The following agencies reported that HB 1163 would impact rulemaking because the agency would have to spend more staff time preparing SERCs, or slow down the rulemaking process: Office of Insurance Regulation, Department of Citrus, Commission on Ethics, and Department of Agriculture and Consumer Services. The Department of Agriculture and Consumer Services also noted that this bill has the potential of increasing rule challenges and litigation.

the public. For example, an agency must repeal a rule when the Legislature repeals the implementing statute.²² In such a case, the purpose of having an agency estimate the regulatory cost of the Legislature's repeal of a law is not clear.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.541, and 120.56.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²² See s. 120.536(2) and (3), F.S.