

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 Rules

BILL: SPB 7028

INTRODUCER: For consideration by the Rules Committee

SUBJECT: Ratification of Department of Elderly Affairs Rules

DATE: February 27, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hendon	Phelps		Pre-meeting
2.				
3.				
4.				

I. Summary:

SPB 7028 ratifies Rule 58A-5.036, F.A.C., entitled “Emergency Environmental Control for Assisted Living Facilities” by the Department of Elder Affairs. This rule requires, by June 1, 2018, each assisted living facility to acquire an alternative power source to ensure that temperatures are maintained at 81 degrees Fahrenheit or cooler in a sufficient portion of the facility to accommodate all of the facility’s residents.

The Statement of Estimated Regulatory Costs (SERC) developed by the Department of Elder Affairs determined that the proposed rule will likely increase regulatory costs in excess of \$1 million in the aggregate within 5 years after implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.

The bill’s provisions take effect upon becoming law.

II. Present Situation:

DOEA Rule for Assisted Living Facility Generators

The DOEA filed the rule 58A-5.036, F.A.C., for adoption with the Department of State on February 13, 2018.¹ The DOEA proposed the rule for Emergency Environmental Control for Assisted Living Facilities on November 14, 2017 and corrected the proposed rule January 19, 2018.

Rule 58A-5.036, F.A.C., requires each assisted living facility to prepare a detailed plan, as a supplement to the facility’s comprehensive emergency management plan, to address emergency

¹ See rule package filed with the Department of State for Rule 58A-5.036. On file with Senate Children, Families and Elder Affairs Committee.

power in the event of the loss of primary electrical power to the facility. The plan is required to include the following:

- The acquisition of a sufficient alternate power source maintained at the facility to ensure the protection of resident health, safety, welfare, and comfort for a minimum of 96 hours in the event of the loss of primary electrical power.
 - Each facility must determine a safe indoor air temperature required to meet the needs of residents that cannot be higher than 81 degrees Fahrenheit. The required temperature must be maintained in an area determined by the facility to be sufficient to maintain resident safety at all times, but not less than 20 square feet per resident.
 - The rule allows a facility to provide emergency power through its essential electrical system required by the Florida Building Code and allows flexibility for each assisted living facility to determine the best method for achieving the requirement for an alternative power source.
 - The rules specifies that a facility in an evacuation zone may use portable generators if an evacuation is necessary; that a facility on a campus with other licensed facilities under common ownership may share power sources, fuel, and space with the other licensed facilities; and that a multistory facility that plans on moving residents to a higher floor during a flood or surge event must also place its alternative power source in an area protected from flooding or storm surge.
- The acquisition of sufficient fuel to run the alternate power source and to maintain safe air temperatures. For facilities with 16 beds or less must store 48 hours of fuel on site. For facilities with 17 or more beds, 72 hours must be stored onsite at the facility. For a facility in a declared state of emergency area must secure 96 hours of fuel. If local ordinances or other regulations limit the amount of fuel that may be stored onsite, the assisted living facility must store the maximum amount of fuel allowed and must have a plan to obtain the remaining required amount of fuel within 24 hours prior to depleting its onsite supply. The rule specifies that piped natural gas is an allowed fuel source.
- The acquisition of services necessary to install, maintain, and test the equipment and to ensure the safe a sufficient operation of the alternate power source.

Each existing assisted living facility is required to submit its plan to the local emergency management agency within 30 days of the effective date of the rule. Each newly licensed assisted living facility must submit its plan prior to obtaining a license. If any additions, modifications, alterations, refurbishments, reconstructions, or renovations of an assisted living facility affect the its compliance with the rule, the facility must amend its plan and resubmit it to the local emergency management agency for review and approval.

The local emergency management agency must review each plan and once approved, the plan must be submitted to AHCA for approval. Each assisted living facility must maintain a copy of its plan in a form that is readily available for review and must submit a consumer friendly summary of the plan to the AHCA. The AHCA must post the summary and notice of approval within ten business days on its website.

Each existing assisted living facility must have implemented its plan no later than June 1, 2018, and a new assisted living facility must have the plan implemented prior to obtaining a license. The AHCA may grant an extension of time up to January 1, 2019, if the implementation is delayed due to necessary construction, delivery of ordered equipment, or zoning or other

regulatory processes. If an assisted living facility is granted an extension of time, the facility must update the AHCA on implementation progress monthly. If an assisted living facility is granted an extension of time, it must make arrangements to ensure that the residents are housed in an area that meets the safe indoor air temperature requirement for a minimum of 96 hours during that time.

The rules also require each facility to implement policies and procedures to ensure that it can effectively and immediately activate, operate, and maintain the alternate power source. The policies and procedures must be resident-focused and ensure that the residents do not suffer complications from heat exposure.

The rules specify that the AHCA may seek any statutory remedy for noncompliance including, but not limited to, license revocation, license suspension, and administrative fines.

Hurricane Irma

Between September 10 and September 16, 2017, Hurricane Irma swept across Florida causing heavy damage and widespread loss of power. In the aftermath of the hurricane, the nursing home Rehabilitation Center at Hollywood Hills (Center) was left without power and air conditioning for multiple days. As a consequence of the uncontrolled heat in the Center and because the Center's staff neglected to evacuate its residents, 12 Center residents died from heat exposure.²

On September 16, 2017, (after eight of the 12 resident deaths had occurred) Governor Scott issued a press release announcing emergency action for nursing homes and ALFs. In the press release, the Governor stated that “[a]ssisted living facilities and nursing homes serve our elderly and Florida’s most vulnerable residents, and so many families rely on the health care professionals at these facilities to care for their loved ones...During emergencies, health care facilities must be fully prepared to ensure the health, safety and wellbeing of those in their care and there is absolutely no excuse not to protect life. The inability for this nursing home in Broward County to protect life has shined the light on the need for emergency action.”³

Statement of Estimated Regulatory Costs (SERC) Requirements

Agencies must prepare a SERC for a rule that has an adverse impact on small businesses or that increases regulatory costs more than \$200,000 in the aggregate within 1 year after implementation of the rule.⁴

A SERC must include estimates of:

- The number of people and entities effected by the proposed rule;
- The cost to the agency and other governmental entities to implement and enforce the proposed rule;

² Eight residents died before the Center evacuated the facility and six more died in the following weeks. Two of the 14 deaths were found not to be related to heat exposure. See *12 of 14 Nursing Home Deaths After Irma Ruled Homicides*, WUSF News, available at <http://wusfnews.wusf.usf.edu/post/12-14-nursing-home-deaths-after-irma-ruled-homicides>, (last visited on Jan. 26, 2018).

³ See <https://www.flgov.com/2017/09/16/gov-scott-i-am-aggressively-fighting-to-keep-vulnerable-floridians-safe-during-emergencies/>, (last visited on Jan. 26, 2018).

⁴ Sections 120.54(3)(b) and 120.541(1)(b), F.S.

- 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.⁵

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 5 years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness,⁶ productivity, or innovation; or
- Regulatory costs, including any transactional costs.^{7,8}

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within 5 years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.⁹

The DOEA has estimated the cost for assisted living facilities to comply with this rule will be approximately \$243 million.¹⁰

III. Effect of Proposed Changes:

SPB 7028 ratifies DOEA Rule 58A-5.036, F.A.C., entitled “Emergency Environmental Control for Assisted Living Facilities.” This rule requires, by June 1, 2018, each facility to acquire an alternative power source to ensure that temperatures are maintained at 81 degrees Fahrenheit or cooler in a sufficient portion of the facility to accommodate all of the facility’s residents. The rule also requires each facility to implement certain policies and procedures to ensure that resident’s do not suffer complications from heat exposure.

The bill also:

- Directs that the act shall not be codified in the Florida Statutes;
- Requires that after the act becomes law, its enactment and effective date shall be noted in the Florida Administrative Code, the F.A.R., or both, as appropriate;
- Provides that the act does not alter rulemaking authority or constitute a legislative preemption of, or exception to, any other provision of law regarding adoption or enforcement of the rule and is intended to preserve the status of the rule; and

⁵ 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. *See ss.* 120.52(18), (19), and 288.703(6), respectively.

⁶ Business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

⁷ Transactional costs are direct costs that are readily ascertainable based upon standard business practices. They include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used, procedures required to be employed to comply with the rule, additional operating costs, the cost of monitoring and reporting, and any other costs necessary to comply with the rules.

⁸ Section 120.541(2)(a), F.S.

⁹ 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.

¹⁰ Summary of SERC for Rule 58A-5.036, published in a notice of correction in the Florida Administrative Register on January 19, 2018.

- Does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of requirements governing adoption of the rule.

The SERC developed by the DOEA determined that the proposed rule will likely increase regulatory costs in excess of \$1 million in the aggregate within 5 years after implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.

The bill's provisions take effect upon becoming law at that time, the rule becomes effective.¹¹

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:

By the Legislature's ratification of this rule, assisted living facilities that have not complied with the new requirements will experience increased costs.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹¹ Section 120.54(3)(e)6., F.S.

VIII. Statutes Affected:

This bill creates one undesignated section of the Florida Statutes.

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.
