

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 83 Agency Rulemaking

SPONSOR(S): Government Accountability Committee; Oversight, Transparency & Administration Subcommittee; Spano

TIED BILLS: **IDEN./SIM. BILLS:** SB 912

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	10 Y, 0 N, As CS	Toliver	Harrington
2) Transportation & Tourism Appropriations Subcommittee	14 Y, 0 N	Cobb	Davis
3) Government Accountability Committee	20 Y, 0 N, As CS	Toliver	Williamson

SUMMARY ANALYSIS

A statement of estimated regulatory costs (SERC) is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule, as well as the potential impact on agencies and other governmental entities to implement the rule. Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule. However, a SERC is mandatory if the proposed rule will have a negative impact on small businesses or increase regulatory costs more than \$200,000 within one year after implementation.

The bill requires an agency to prepare a SERC before the adoption or amendment of any rule other than an emergency rule. Additionally, the bill requires an agency to prepare a SERC for a rule repeal if such repeal would impose a regulatory cost, and establishes that in a challenge to a rule repeal, the repeal must be considered presumptively correct by the adjudicating body.

The bill requires the Department of State (department) to include on the Florida Administrative Register website the agency website addresses where each agency's SERCs can be viewed in their entirety. An agency must include in its notice of intended action the agency website address where SERCs can be viewed in their entirety. If an agency revises a SERC, it must provide a notice that a revision has been made and include an agency website address where the revision can be viewed for publication on the Florida Administrative Register website.

The bill also removes the requirement that the agency head approve certain rulemaking notices.

The department states the bill will not result in a fiscal impact to its operations; however, to the extent that state agencies must complete additional SERCs, the bill may have a negative, though likely insignificant, fiscal impact on state government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Rulemaking

The Administrative Procedure Act¹ sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. 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.² Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to “adopt, develop, establish, or otherwise create”³ rules. Agencies do not have the discretion in and of themselves to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.⁵ The grant of rulemaking authority itself need not be detailed. 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.⁶

An agency begins the formal rulemaking process, upon approval of the agency head, by filing a notice of the proposed rule.⁷ The notice is published by the Department of State (department) in the Florida Administrative Register⁸ and provides certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule.⁹ Although the notice includes a summary of the SERC, if prepared, publication of the SERC is not required.

Statement of Estimated Regulatory Costs

A SERC is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs to the public of complying with the rule as well as to the agency and other governmental entities to implement the rule.¹⁰ Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.¹¹ However, a SERC is required if the proposed rule will have a negative impact on small businesses or increase regulatory costs by more than \$200,000 in the aggregate within one year after implementation of the rule.¹²

A SERC must include:

- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of 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.¹³

¹ Chapter 120, F.S.

² Section 120.52(16), F.S.

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

⁵ Sections 120.52(8) and 120.536(1), F.S.

⁶ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

⁷ Section 120.54(3)(a)1., F.S.

⁸ Section 120.55(1)(b), F.S.

⁹ Section 120.55(1)(b)1. and 2., F.S.

¹⁰ Section 120.541(2), F.S.

¹¹ Section 120.54(3)(b)1., F.S.

¹² Section 120.54(3)(b)1., F.S.

¹³ Section 120.541(2)(b)-(e), F.S.

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, productivity, or innovation; or
- Regulatory costs, including any transactional costs.¹⁴

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 rule must be ratified by the Legislature in order to take effect.¹⁵

Within 21 days after publication of a notice of adoption, amendment, or repeal of a rule a person substantially affected by the proposal may submit to the agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule that substantially accomplishes the objectives of the law being implemented.¹⁶ If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that alteration.¹⁷ At least 21 days before filing a rule for adoption, an agency that is required to revise a SERC must provide the statement to the person who submitted the lower cost regulatory alternative and to the Joint Administrative Procedures Committee¹⁸ and must provide notice on the agency's website that it is available to the public.¹⁹

Effect of the Bill

The bill requires an agency to prepare a SERC before the adoption or amendment of any rule other than an emergency rule. Additionally, the bill requires an agency to prepare a SERC for a rule repeal if such repeal would impose a regulatory cost, and establishes that in a challenge to a rule repeal, the repeal must be considered presumptively correct by the adjudicating body.

The bill requires each agency to have a website where each of its SERCs may be viewed in their entirety. The department must include on the Florida Administrative Register website the agency website addresses where the SERCs can be viewed. An agency must provide in its notice of intended action the agency website addresses where the SERCs can be viewed. If an agency revises a SERC, it must provide a notice that a revision has been made and include an agency website address where the revision can be viewed for publication on the Florida Administrative Register website.

Lastly, the bill removes the requirement that the agency head approve certain rulemaking notices.

B. SECTION DIRECTORY:

Section 1 amends s. 120.54, F.S., relating to rulemaking.

Section 2 amends s. 120.541, F.S., relating to SERCs.

Section 3 amends s. 120.55, F.S., relating to publication of rules.

Section 4 amends s. 120.56, F.S., relating to challenges to rules.

¹⁴ Section 120.541(2)(a), F.S.

¹⁵ Section 120.541(3), F.S.

¹⁶ Section 120.541(1)(a), F.S.

¹⁷ Section 120.541(1)(c), F.S.

¹⁸ The Joint Administrative Procedures Committee is a standing committee of the Legislature created for the purpose of maintaining a continuous review of administrative rules, the statutory authority upon which those rules are based, and the administrative rulemaking process. Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.

¹⁹ Section 120.541(1)(d), F.S.

Section 5 provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The department states the bill will not result in a fiscal impact to its operations;²⁰ however, to the extent that state agencies must complete additional SERCs, the bill may have a negative, though likely insignificant, fiscal impact on state government.²¹

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

²⁰ Email from the Department of State, April 13, 2017, on file with the Transportation & Tourism Appropriations Subcommittee.

²¹ 2018 Agency Bill Analyses from the Department of Business and Professional Regulation, the Agency for State Technology, the Department of Agriculture and Consumer Services, the Department of Juvenile Justice, the Department of State, the Department of Elder Affairs, and the Department of Citrus estimate certain fiscal impacts to their operations. 2018 Agency Bill Analyses for HB 83 on file with the Oversight, Transparency & Administration Subcommittee.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 11, 2017, the Oversight, Transparency & Administration Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment made several technical changes to the bill. The amendment:

- Changed the phrase “Joint Administrative Procedures Committee” to “committee” as that is a defined term in s. 120.52(4), F.S.;
- Changed the phrase “Division of Administrative Hearings” to “division” as that is a defined term in s. 120.52(5), F.S.;
- Removed a phrase in s. 120.541(1)(a), F.S., to conform to changes made by the bill;
- Repealed s. 120.541(1)(b), F.S., as the provision was rendered redundant; and
- Changed “Department” to “department” in s. 120.541(6), F.S.

On January 11, 2018, the Government Accountability Committee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment made conforming changes, corrected a grammatical error, and corrected a cross-reference.

This analysis is drafted to the committee substitute as passed by the Government Accountability Committee.