

**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 Governmental Oversight and Accountability

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BILL: SB 912

INTRODUCER: Senator Broxson

SUBJECT: Agency Rulemaking

DATE: January 12, 2018

REVISED: 01/17/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	Caldwell	GO	<b>Favorable</b>
2.			ATD	
3.			AP	

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**I. Summary:**

SB 912 requires an agency to prepare a statement of estimated regulatory costs (SERC) before the adoption or amendment of any rule other than an emergency rule. 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 also deletes provisions in current law requiring a SERC if the proposed rule will have an adverse impact on small business or the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after implementation of the rule.

Additionally, the bill requires the Department of State 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's website address where SERCs can be viewed in their entirety. If an agency revises a SERC, it must provide notice that a revision has been made and include an agency website address where the revision can be viewed for publication in the Florida Administrative Register.

The bill has an effective date of July 1, 2018.

## II. Present Situation:

### Rulemaking

The Administrative Procedure Act<sup>1</sup> 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.<sup>2</sup> Rulemaking authority is delegated by the Legislature through statute and explicitly authorizes agencies to “adopt, develop, establish, or otherwise create”<sup>3</sup> rules. Agencies do not have the discretion in and of themselves 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. 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>6</sup>

An agency begins the formal rulemaking process, upon approval of the agency head, by filing a notice of the proposed rule.<sup>7</sup> The notice is published by the Department of State (Department) in the Florida Administrative Register<sup>8</sup> and must provide 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.<sup>9</sup> 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.<sup>10</sup> Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.<sup>11</sup> A SERC is required, however, if the proposed rule will have an adverse impact on small businesses or is likely to directly or indirectly increase regulatory costs by more than \$200,000 in the aggregate within one year after implementation of the rule.<sup>12</sup>

A SERC must include good faith estimates of:

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

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<sup>1</sup> Chapter 120, F.S. *See also* s. 120.51, F.S.

<sup>2</sup> Section 120.52(16), F.S.

<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) and 120.536(1), F.S.

<sup>6</sup> *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).

<sup>7</sup> Section 120.54(3)(a)1., F.S.

<sup>8</sup> Section 120.55(1)(b), F.S.

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

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

<sup>11</sup> Section 120.54(3)(b)1., F.S.

<sup>12</sup> Section 120.54(3)(b)1.a. and b., 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.<sup>13</sup>

The SERC must also include an economic analysis showing whether the rule directly or indirectly is likely to have an adverse impact in excess of \$1 million within the first 5 years after implementation of the rule on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness,<sup>14</sup> productivity, or innovation; or
- Regulatory costs, including any transactional costs.<sup>15</sup>

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.<sup>16</sup>

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 which substantially accomplishes the objectives of the law being implemented.<sup>17</sup> 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.<sup>18</sup> 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 Committee (JAPC)<sup>19</sup> and must provide notice on the agency's website that it is available to the public.<sup>20</sup>

### ***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 JAPC.<sup>21</sup>

<sup>13</sup> 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 and 288.703, F.S.

<sup>14</sup> Business competitiveness includes the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets. *See* Section 120.541(2)(a)2., F.S.

<sup>15</sup> Section 120.541(2)(a), F.S.

<sup>16</sup> Section 120.541(3), F.S.

<sup>17</sup> Section 120.541(1)(a), F.S.

<sup>18</sup> Section 120.541(1)(c), F.S.

<sup>19</sup> The Administrative Procedures Committee defined in s. 120.52(4), F.S., is also known as the Joint Administrative Procedures Committee, which 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.

<sup>20</sup> Section 120.541(1)(d), F.S.

<sup>21</sup> Email from Ken Plante, JAPC Coordinator, dated Jan. 10, 2018 (copy on file with the Senate Governmental Oversight and Accountability Committee).

Year	Number of Proposed Rules	Number of SERCs	Percentage of Proposed Rules which Required SERCs
2017	1,760	41	2%
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%

### Department of State

The Secretary of State is the state's chief of elections, chief cultural officer and head of the Department of State (Department).<sup>22</sup> The Secretary of State is appointed by the Governor, subject to confirmation by the Senate, and serves at the pleasure of the Governor.<sup>23</sup> The Secretary of State also performs functions conferred by the State Constitution upon the custodian of state records.<sup>24</sup> The Department is composed of the following divisions: Elections, Historical Resources, Corporations, Library and Information Services, Cultural Affairs, and Administration.<sup>25</sup>

The Department's Administrative Code and Register Section is the filing repository for rules promulgated by state agencies and is responsible for publishing the Florida Administrative Register.<sup>26</sup>

### III. Effect of Proposed Changes:

**Section 1** of the bill amends s. 120.54, F.S., to remove the requirement that the agency head approve certain rulemaking notices and to require each agency to have a website where each of their SERCs may be viewed in their entirety.

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 Administrative Procedures Committee, in any proceeding before Division of Administrative Hearings, or in any proceeding before a court of competent jurisdiction.

The bill deletes provisions requiring a SERC if the proposed rule will have an adverse impact on business or the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after implementation of the rule.

<sup>22</sup> Section 20.10(1), F.S. Also see <http://dos.myflorida.com/about-the-department/> (last visited on January 3, 2018).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Section 20.10(2), F.S.

<sup>26</sup> See Department of State, Administrative Code and Register, available at <http://dos.myflorida.com/offices/administrative-code-and-register/> (last visited on Jan. 11, 2018).

**Section 2** of the bill amends s. 120.541, F.S., by deleting provisions requiring a SERC if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after implementation of the rule.

The bill also requires the Department to include on the Florida Administrative Register website the agency website addresses where the SERCs can be viewed in their entirety. An agency that prepares a SERC must provide in its notice of intended action the agency website addresses where the SERC can be read in its entirety to the Department for publication in the Florida Administrative Register. 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 in the Florida Administrative Register.

**Section 3** of the bill provides an effective date of July 1, 2018.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

##### **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:**

The Department of Law Enforcement noted in its analysis that the bill would require agencies to prepare a SERC for every rule in development.<sup>27</sup>

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<sup>27</sup> Department of Law Enforcement, SB 912 Agency Analysis (Nov. 27, 2017) (copy on file with the Senate Governmental and Accountability Committee).

**VI. Technical Deficiencies:**

Section 120.52(4), F.S., defines the term “Committee” as the Administrative Procedures Committee. Lines 89 through 90 refer to the Administrative Procedure Committee. The term “committee” should be used for this reference. Also, it appears that provisions regarding preparation of a SERC for proposed rules having an adverse impact on small business or increasing regulatory costs in excess of \$200,000 contained in s. 120.541(1)(b), F.S., may need to be stricken, as similar provisions were deleted in lines 92 through 100 of the bill for s. 120.54(3)(b)1., F.S.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 120.54 and 120.541 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.