
Committee on Governmental Rules & Regulations
(Public Responsibility Council)
Interim Project

Statement of Estimated Regulatory Costs
(SERC)



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Mandatory Statement of Estimated Regulatory Costs

ESTABLISHING A FISCAL THRESHOLD FOR A MANDATORY STATEMENT OF ESTIMATED REGULATORY COSTS FOR A PROPOSED RULE BY AN AGENCY PURSUANT TO SECTION 120.541 AND FOR MANDATING AN ANALYSIS OF LEGISLATION PROPOSING REGULATION OF BUSINESS OR OTHER ACTIVITIES.

Summary

The State of Florida generally does not complete a benefit/cost analysis or cost assessment of proposed legislation. The exception for legislation is a statutory requirement found in s. 11.62, the Sunrise Act, which requires an analysis of proposed regulation of a profession or occupation based on criteria found in that section.

An agency is required under s. 120.541 to prepare a *statement of estimated regulatory costs* (SERC) when, as directed by the statute, a party whose substantial interests are affected by the proposed rule submits a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objective of the law being implemented.

The federal government does not generally conduct benefit/cost reviews of proposed legislation. However, there are some private or non-profit research groups that do produce benefit/cost reports on some proposed legislation. An executive order requires executive branch agencies to prepare an impact statement for proposed regulations that will have an annual impact that is greater than ten million dollars. Otherwise, the type and depth of analysis of proposed regulation performed by an federal agency is dependent upon the mandate of the underlying statute.

It does not appear from the literature that other state legislatures conduct any systematic benefit/cost analysis of proposed legislation. Most states require administrative agencies to conduct some type of review of proposed administrative rules. Additionally, some states require an economic impact statement or fiscal analysis of a proposed rule if the rule pertains to a particular subject or is estimated to have an annual impact that exceeds a stated threshold.

Benefit/Cost Analysis of Proposed Legislation

The State of Florida. Section 11.62 provides for legislative intent, a legislative report to be produced addressing the factors described below, and for information to be provided to the Legislature by certain groups when legislation proposes to regulate a profession or occupation not currently regulated. The statute only pertains to the regulation of professions or occupations; the Legislature is not required to conduct this type of review for regulation of businesses or regulation of other activities. The section is set out in its entirety below.

11.62. Legislative review of proposed regulation of unregulated functions.

(1) This section may be cited as the "Sunrise Act."

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(2) It is the intent of the Legislature:

(a) That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and

(b) That no profession or occupation be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupational services to the public.

(3) In determining whether to regulate a profession or occupation, the Legislature shall consider the following factors:

(a) Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare and whether the potential for harm is recognizable and not remote;

(b) Whether the practice of the profession or occupation requires specialized skill or training, and whether that skill or training is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;

(c) Whether the public is or can be effectively protected by other means; and

(d) Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

(4) The proponents of legislation that provides for the regulation of a profession or occupation not already expressly subject to state regulation shall provide, upon request, the following information in writing to the state agency that is proposed to have jurisdiction over the regulation and to the legislative committees to which the legislation is referred:

(a) The number of individuals or businesses that would be subject to the regulation;

(b) The name of each association that represents members of the profession or occupation, together with a copy of its codes of ethics or conduct;

(c) Documentation of the nature and extent of the harm to the public caused by the unregulated practice of the profession or occupation, including a description of any complaints that have been lodged against persons who have practiced the profession or occupation in this state during the preceding 3 years;

(d) A list of states that regulate the profession or occupation, and the dates of enactment of each law providing for such regulation and a copy of each law;

(e) A list and description of state and federal laws that have been enacted to protect the public with respect to the profession or occupation and a statement of the reasons why these laws have not proven adequate to protect the public;

(f) A description of the voluntary efforts made by members of the profession or occupation to protect the public and a statement of the reasons why these efforts are not adequate to protect the public;

(g) A copy of any federal legislation mandating regulation;

(h) An explanation of the reasons why other types of less restrictive regulation would not effectively protect the public;

(i) The cost of regulation, including the indirect cost to consumers, and the method proposed to finance the regulation;

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(j) The details of any previous efforts in this state to implement regulation of the profession or occupation; and

(k) Any other information the agency or the committee considers relevant to the analysis of the proposed legislation.

(5) The agency shall provide the Legislature with information concerning the effect of proposed legislation that provides for new regulation of a profession or occupation regarding:

(a) The departmental resources necessary to implement and enforce the proposed regulation;

(b) The technical sufficiency of the proposal for regulation, including its consistency with the regulation of other professions and occupations under existing law; and

(c) If applicable, any alternatives to the proposed regulation which may result in a less restrictive or more cost-effective regulatory scheme.

(6) When making a recommendation concerning proposed legislation providing for new regulation of a profession or occupation, a legislative committee shall determine:

(a) Whether the regulation is justified based on the criteria specified in subsection (3), the information submitted pursuant to request under subsection (4), and the information provided under subsection (5);

(b) The least restrictive and most cost-effective regulatory scheme that will adequately protect the public; and

(c) The technical sufficiency of the proposed legislation, including its consistency with the regulation of other professions and occupations under existing law.

The federal government. The United States Congress does not appear to conduct any formal benefit/cost analysis on proposed legislation. Much of the literature reviewed by staff consists of criticisms of the lack of a macro view of regulatory impacts, examples of the burdens imposed upon businesses and professions, and prescriptions to cure the malady. Several research groups have begun to supply real-time critiques of legislation proposing additional regulation or of administrative rules that would impose additional regulatory requirements.

Other state governments. Likewise, it does not appear that other states conduct a benefit/cost analysis of legislation that proposes to regulate a profession or business.

Benefit/Cost Analysis of Proposed Administrative Rules

State of Florida. The Governor's 1995 Administrative Procedure Act Review Commission recommended that the "Economic Impact Statement" provided in then current law be replaced with a simpler and more meaningful "Statement of Estimated Regulatory Costs." The new section, 120.541, Florida Statutes, provides for a statement of estimated regulatory costs. It provides that any substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative. The person must submit the proposal within 21 days of the notice of adoption, amendment or repeal of a rule. The proposal may include the alternative of not adopting a rule, but it must include an explanation of how the lower costs and objectives of the law will be achieved by not adopting any rule.

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When a lower cost regulatory alternative is presented to an agency, the agency must prepare a statement of estimated regulatory costs and either adopt the alternative or provide reasons for rejecting the alternative in favor of the proposed rule. Failure of the agency to prepare or revise the statement of estimated regulatory costs is a material failure to follow the applicable rulemaking procedures or requirements provided in chapter 120, Florida Statutes. The agency must provide the statement to the person submitting the alternative and to the public prior to filing the rule for adoption.

A rule may not be declared invalid because it imposes regulatory costs that could be reduced by the adoption of less costly alternatives. In addition, a rule may not be declared invalid based upon a challenge to the agency's statement of estimated regulatory costs unless: the issue is raised within one year of the effective date of the rule; the substantial interests of the person challenging the agency's rejection of the lower cost alternative is materially affected; and the agency fails to prepare or revise the statement as required, or the challenge is to the agency's rejection of the lower cost alternative.

The statement of estimated regulatory costs must include:

- a) A good faith estimate of the number of persons or entities likely to be required to comply with the rule, along with a general description of the types of individuals the rule will likely affect.
- b) A good faith estimate of the cost to an agency and other state and local government entities of implementing and enforcing the rule and any anticipated effect on state or local revenues.
- c) A good faith estimate of the "transactional costs" likely to be incurred by the regulated public and local government. Transactional costs are direct costs on a regulated person including filing fees, cost of licensing, the cost of equipment, operating costs, and the cost of monitoring and reporting.
- d) An analysis of the impact on small businesses, small counties and small cities.
- e) Any additional information that the agency determines to be useful.
- f) A description of any good faith written proposal submitted by a regulated person and a statement adopting the proposal or a statement of the reasons for rejecting the proposal.

OPPAGA Study. Additionally, the Office of Program Policy Analysis and Government Accountability (OPPAGA) conducted a study pursuant to proviso language in ch. 98-422, Laws of Florida, which directed it to study the issue of government regulatory costs.¹ The proviso language required OPPAGA to prepare a study that:

1. Proposes methodologies for and the time and resources needed to estimate state agencies' costs of administering regulatory programs and activities (administrative costs) and businesses' costs in complying with those programs and activities (compliance costs.) These

¹ Office of Program Policy Analysis and Government Accountability (OPPAGA), *Estimating the Cost of State Regulatory Programs and Activities: Possible Approaches*, Report 98-78 (April 1998).

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costs are to be further categorized into the costs of regulations designed to protect individual and societal health and safety (social regulatory costs) and those designed to regulate the market place (economic regulatory costs). In each of these categories, the cost of paperwork is to be separately identified;

2. Proposes methodologies for establishing benefit/cost considerations in rulemaking and estimates the resources and time required to implement these methodologies; and
3. Provides a comprehensive bibliography of published regulatory cost studies.

The report concluded that conducting a study of the cost of state regulation is feasible but would likely require significant effort and cost. If the Legislature determines that such a study is necessary, then the Governor's Office should be directed to contract with a private consultant with experience and expertise in conducting large-scale surveys and economic analyses. The report also provided several alternatives to this study and suggested that the current statement of estimated regulatory costs be required only when a certain threshold is reached. It also suggested that s. 11.62, the Sunshine Act, be expanded to cover not only the regulation of new professions or occupations, but to mandate the application of the act when the Legislature proposes to impose new regulation on a profession or occupation already regulated, or when it enacts regulatory law that affects other entities.

The Federal Government. The federal government addresses the process of regulatory review in a piecemeal fashion. Presidents have attempted over the last twenty years to provide more oversight and review of existing and proposed federal regulation through the issuance of executive orders. These executive orders sought to streamline existing regulation and to provide in-depth economic analysis of proposed regulation. It is through an executive order that federal agencies are directed to prepare an impact statement for proposed regulations that will have an annual impact that is greater than ten million dollars. These orders have had marginal success in reforming regulation.

In response to the rising tide of criticism on the issue of the expansive nature of federal regulation, Congress has over the last several years added to specific statutes language requiring greater economic assessment or the use of benefit/cost analysis in the promulgation of new rules. The chart below describes some of the recent regulatory reform legislation.

Table 1: Recent Federal Regulatory Reform Legislation²

Legislation	Description
Unfunded Mandates Reform Act of 1995	Requires the Congressional Budget Office to estimate the direct costs of unfunded federal mandates with significant economic impacts. Requires agencies to describe the costs and benefits of the majority of such mandates. Requires agencies to identify alternatives to the proposed mandate and select the "least costly, most cost-effective, or least burdensome alternative" that achieves the desired social objective.
Small Business Regulatory Enforcement Fairness Act of 1996	Requires agencies to submit each final regulation with supporting analyses to Congress. Congress has sixty days to review major regulations, and can enact a joint resolution of disapproval to void the regulation if the resolution is passed and signed by the President. Strengthens judicial review provisions to hold agencies more accountable for the impacts of regulation on small entities.
Telecommunications Act of 1996	Allows the Federal Communications Commission to grant exemptions from regulations in certain cases and requires the consideration of the costs and benefits of specific provisions. Allows the Commission to grant waivers to buy-out prohibitions on local telephone companies if the anticompetitive effects are "clearly outweighed" by the benefits to the community of the transaction. Requires the Commission to conduct a biennial review of all regulations to determine whether any regulations are no longer necessary as a result of "meaningful economic competition" between providers.
Food Quality Protection Act of 1996	Eliminates the Delaney Clause of the Food, Drug, and Cosmetic Act, which set a zero-tolerance standard for pesticide residues on processed food. Establishes a "safe" tolerance level, defined as "a reasonable certainty of no harm." Allows the Administrator of the Environmental Protection Agency to modify the tolerance level if use of the pesticide protects consumers from health risks greater than the dietary risk from the residue, or if use is necessary to avoid a "significant disruption" of the food supply. Amends the Federal Insecticide, Fungicide, and Rodenticide Act by requiring a reevaluation of the safe tolerance level after the Administrator determines during the reregistration process whether a pesticide will present an "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."
Safe Drinking Water Act Amendments of 1996	Amends the procedure to set maximum contaminant levels for contaminants in public water supplies. Adds requirement to determine whether the benefits of the level justify the costs. Maintains feasibility standard for contaminant levels, unless feasible levels would result in an increase in the concentration of other contaminants, or would interfere with the efficacy of treatment techniques used to comply with other national drinking water regulations. Requires the Administrator to set contaminant levels to minimize the overall risk of adverse health effects by balancing the risk from the contaminant and the risk from other contaminants in such cases.
Amended Gas Pipeline Safety Standards, 1996	Requires the Secretary of Transportation to consider the benefits and costs expected to result from implementation of a safety standard, and to propose a standard only if the benefits justify its costs. The benefit and cost estimates are based on a risk assessment, for which the Secretary must identify regulatory and nonregulatory options and must explain the selection of the standard in lieu of other options.
Regulatory Accountability Provision of 1996, 1997, and 1998	In separate appropriations legislation in 1996, 1997, and 1998, Congress required the Office of Management and Budget to submit an assessment of the annual benefits and costs of all existing federal regulatory programs to Congress for 1997, 1998, and 2000, respectively. The Office of Management and Budget already must review and approve analyses submitted by agencies estimating the costs and benefits of major proposed rules. The annual report provisions build on this review process.

² Robert W. Hahn, AEI-Brookings Institute Joint Center for Regulatory Studies, *State and Federal Regulatory Reform: a Comparative Analysis*, Working Paper 98-3 at 19 (1998).

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Other state governments. Most states conduct some form of review of proposed regulations. Attached as an appendix is a listing of the states that conduct a review of proposed legislation and each state's statutory requirements for that review.

Draft Language for the Committee on Governmental Rules and Regulations Proposed Committee Bill 99-01

The draft consists of two parts. The first is an amendment to s. 120.541 that would mandate the preparation of a SERC when the agency make a preliminary estimate of the annual costs of implementing and enforcing the proposed rule as well as the transactional costs as described in Chapter 120 exceed 1.5 million dollars annually.

The second part provides for the Legislative review or new regulatory schemes. The draft provides that when the legislature proposes a new regulatory scheme, certain factors would have to be address in consideration of the legislation. The language of this part tracks the process of the SERC, in that the Legislature is to collected information to prepare good faith estimates of the entities impacts by the new regulation, the costs of implementing and enforcing the new regulation, and the transactional costs of associated with the scheme.