

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 Governmental Oversight and Accountability Committee

BILL: CS/SB 2140

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Joyner

SUBJECT: Administrative Procedures

DATE: April 21, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pugh	Cooper	CM	Favorable
2.	McKay	Wilson	GO	Fav/CS
3.			WPSC	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill amends provisions relating to the review of proposed agency administrative rules by the Small Business Regulatory Advisory Council (SBRAC), by providing for earlier notice of rules to SBRAC, allowing more time for SBRAC and substantially affected persons to offer lower-cost regulatory alternatives, clarifying criteria related to declaring a rule invalid because it does not have a required statement of regulatory costs (SERC), and allowing more time for the agency to consider and respond to those offered alternatives.

The bill also makes a number of technical, grammatical, and clarifying changes.

The bill amends ss. 120.54, 120.541, 120.56, and 120.60, F.S.

II. Present Situation:

The Administrative Procedure Act

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been

adopted to provide parties in administrative proceedings with procedural protection and due process.¹ The APA allows individuals who feel that their interests are being or will be affected by the preliminary decisions of agencies to challenge those decisions.² The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and
- The right to know the factual bases and policy reasons for agency action.³

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons.⁴ Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.⁵

Analysis of Regulatory Costs

As part of the administrative rulemaking process, agencies may develop a statement of estimated regulatory costs (SERC) for its rules that must include:⁶

- A good-faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;
- A good-faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues;
- A good-faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule;
- An analysis of the impact on small businesses, small counties, and small cities;
- Additional information that the agency determines may be useful; and
- If applicable, a description of any good-faith written proposal submitted for a lower cost regulatory alternative to a proposed rule that substantially accomplishes the objective of the law being implemented, and the agency's response to the alternative.

An agency is encouraged to prepare a SERC prior to the adoption, amendment, or repeal of any rule other than an emergency rule. A SERC affecting small businesses, however, must be

¹ 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

² Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); *see also* 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

³ 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (*quoting Singer Island Civic Ass'n, Inc. v. State Dep't of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

⁴ Rigot, *supra* note 2, at 14.

⁵ *Id.*

⁶ Section 120.541(2), F.S.

prepared by an agency and must not be limited to only those proposed rules that have an adverse impact on small business, but done on any rule that affects a small business.

Any substantially affected person,⁷ or SBRAC,⁸ may submit a written proposal for a lower cost regulatory alternative. Once submitted, an agency is required to prepare a SERC or revise an existing one. The agency must adopt the alternative or give reasons for rejecting it. The agency's failure to prepare or revise a SERC is considered a material failure to follow rulemaking procedures.

Chapter 120, F.S., includes a number of deadlines⁹ for agency publication of proposed rules, or modifications to or repeal of rules; for filing a lower cost regulatory alternative; and for filing a challenge to a proposed rule or agency action based on the imposition of regulatory costs to the substantially affected person, small business, or local government.

Rules Relating to Small Business

Pursuant to s. 288.703(1), F.S., "small business" means any independently owned and operated business enterprise that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in Florida with a Small Business Administration 8(a) certification. For sole proprietorships, the \$5 million net worth requirement includes both personal and business investments.

However, for purposes of the APA, an agency may define a "small business" as having more than 200 employees if that is necessary to more fully evaluate whether a rule has broad discriminatory impacts on certain industries.

Each agency, before the adoption, amendment, or repeal of a rule, is required to consider the impact of the rule on a small business and a SERC must be prepared. Under the current law:

- An agency is required to provide the SBRAC and the Governor's Office of Tourism, Trade, and Economic Development (OTTED) with notice of a proposed rule that affects small businesses 28 days prior to its adoption.
- SBRAC has 21 days after it receives notice of a rule in which to review the impact of that rule on small businesses and offer alternatives to lessen the identified impact.
- If SBRAC offers a small-business alternative, the time limit for adopting the rule is extended 21 days, within which time the agency must consider the alternative, revise its statement of estimated regulatory costs as necessary, and accept or reject the alternative.
- If an agency does not adopt the SBRAC alternative, it must, prior to rule adoption or amendment, file a detailed written statement with the Joint Administrative Procedures Committee (JAPC) and SBRAC explaining the reasons for failure to adopt the alternatives.¹⁰
- SBRAC may request the President of the Senate and the Speaker of the House of Representatives to direct the Office of Program Policy and Government Accountability

⁷ Section 120.541(1), F.S.

⁸ Section 120.54(3)(b)2.b.(II), F.S.

⁹ Section 120.541(1)(c), F.S.

¹⁰ Section 120.54(3)(b), F.S.

(OPPAGA) to determine whether the rejected alternatives reduce the impact on small businesses and still meet the stated objectives of the proposed rule.

- Within 60 days after the presiding officers request OPPAGA to evaluate these issues, OPPAGA must report its findings to JAPC. It also must submit a report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives.
- JAPC formally reports OPPAGA's findings to the agency, which must respond in writing to JAPC why it still does not want to adopt the SBRAC alternatives.

Joint Administrative Procedures Committee

Within the APA, the responsibility of the Legislature's Joint Administrative Procedures Committee (JAPC) is delineated.¹¹ As a check on legislatively created authority, JAPC examines every proposed rule, unless exempted by law, and may examine existing rules to make certain determinations. Each proposed rule, rule modification, or rule repeal is evaluated by JAPC using the following guidelines:

- Is the rule an invalid exercise of delegated legislative authority;
- Has the statutory authority for the rule been repealed;
- Is it in proper form, was proper notice given and was it adequate for the purpose and effect of the rule;
- Is it consistent with expressed legislative intent;
- Is it a reasonable implementation of the law as it affects persons impacted;
- Is it necessary to implement the law cited;
- Could regulatory costs on the regulated persons, county, or city impacted by the rule be reduced by adoption of a less costly alternative;
- Could the rule be made less complex or more easily understandable by the general public;
- Does the rule require an additional appropriations; and
- If an emergency rule, is the emergency status justified.¹²

If after review of a proposed rule and any information required from an agency, JAPC objects to the rule, it has 5 days to certify the objection to the agency along with its detailed concerns. JAPC also notifies the President of the Senate and the Speaker of the House of Representatives of its concerns.¹³

Within 30 to 45 days of receipt of the objection, an agency, depending upon its structure, must do the following:

- If the rule is not in effect, it must notice modifications of the rule that address JAPC's concerns or withdrawal of the rule, or notify JAPC that it refuses to do either.
- If the rule is in effect, it must notice to amend the rule to address JAPC's concerns or to repeal the rule, or to notify JAPC that it refuses to do either.
- If the objection is with the SERC, the agency must prepare a corrected SERC, notice it, and send a copy to JAPC, or notify JAPC that it will not comply.¹⁴

¹¹ Section 120.545, F.S.

¹² See s. 120.545(1), F.S.

¹³ See s. 120.545(2), F.S.

¹⁴ See s. 120.545(3)(c), F.S.

If an agency refuses to respond within timeframes required for a proposed rule, the rule is considered withdrawn. Any other lack of response is considered a refusal to take action by the agency.¹⁵

If JAPC objects to a rule, or portion of a rule, and the agency does not begin administrative action consistent with the objection within 60 days after objection or fails to proceed in good faith to complete the action, JAPC makes recommendations for changes in the law, if determined necessary. Those recommendations for change, if any, are presented as legislation to come before the Senate or House of Representatives for consideration just as are other issues.¹⁶

An agency is notified of JAPC's vote to introduce legislation. JAPC may request the agency to temporarily suspend the rule or its adoption, pending consideration of proposed legislation during the next regular session of the Legislature.¹⁷ An agency has up to 45 days to respond to JAPC's request to suspend the rule or its adoption. Failure of the agency to respond is considered a refusal to act. Nothing prevents an agency from refusing to take action as requested by JAPC.¹⁸

If legislation addressing the objections fails to become law, the temporary rule suspensions by an agency expire.¹⁹

The Small Business Regulatory Advisory Council

Created in 2008,²⁰ the Small Business Regulatory Advisory Council (SBRAC) is an advisory body with primary responsibilities to:

- Advocate for small businesses in Florida;
- Evaluate agency rules for their impact on small businesses and offer alternatives that accomplish the same goals with less adverse impacts on small businesses;
- Participate in the Agency Sunset Review process in s. 11.905, F.S.; and
- Develop a "Small Business Friendliness and Development Scorecard" that rates state agency rules.

SBRAC has nine board members consisting of private citizens who are current or former small-business owners, three each appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives. It currently has three full-time staff and two part-time interns and is housed administratively within the Florida Small Business Development Center Network, based in Pensacola at the University of West Florida. For FY 09-10, SBRAC received \$250,000 in state general revenue for its operations.

According to information compiled by SBRAC and presented before legislative committees earlier this year:²¹

¹⁵ See s. 120.545(4), (5), and (6), F.S.

¹⁶ See s. 120.545(8), F.S.

¹⁷ See s. 120.545(8)(b)1., F.S.

¹⁸ Section 120.545(8)(b)2., F.S.

¹⁹ Section 120.545(8)(d), F.S.

²⁰ Created by passage of ch. 2008-149, L.O.F. (See s. 288.7001, F.S.) More information is available at the website, <http://floridasbrac.org>.

- Since January 2009, when SBRAC began meeting, more than 1,200 proposed or modified rules have been published in the Florida Administrative Weekly;
- SBRAC has formally reviewed and discussed 130 sets of rules;
- SBRAC has formally requested agencies to adopt lower-cost regulatory alternatives to 17 proposed rules; and
- Agencies have declined SBRAC's recommended alternatives on 11 rules.

In those legislative presentations, SBRAC has expressed three issues of concern:²²

- Not all state agencies are aware of SBRAC's responsibilities or the requirement that agencies must prepare SERCs, using current and relevant economic data, for proposed rules that adversely impact small businesses;
- The 21-day rule review period SBRAC operates under to review rules; and
- The need for state appropriations to SBRAC for staffing, travel, and other operational expenses so that it can meet its statutory responsibilities.

The SBRAC and the Office of the Small Business Advocate were created to represent Florida's small-business community. According to information reported by SBRAC in 2009:²³

- More than 99 percent of Florida's businesses – or 1.94 million enterprises – are small businesses.
- Of that number, 1.52 million are self-employed individuals and 426,073 are businesses that employ fewer than 500 workers.
- Florida has an estimated 4,356 businesses with more than 500 employees.
- Small employers created nearly 60 percent of all net new jobs in Florida.

III. Effect of Proposed Changes:

The bill makes a number of changes in the Administrative Procedure Act to facilitate the Small Business Regulatory Advisory Council's ability to receive proposed rules, fully evaluate them in a timely fashion, and have sufficient time to develop lower cost regulatory alternatives. The bill also redrafts or reorganizes existing provisions in the APA to provide clarity or remove obsolete references.

Section 1 amends s. 120.54, F.S., to provide earlier notice to SBRAC by requiring agencies to state in the notice of rule development whether a proposed rule may have an adverse impact on small businesses and, if there is such an impact, provide the notice either electronically or in writing to SBRAC.

Specifically under the changes to this section:

- If a proposed rule will adversely impact small businesses, the agency must prepare a statement of the estimated regulatory costs of the rule and provide it to SBRAC and the

²¹ PowerPoint presentation available at <http://www.floridaosba.org/GenDocs/012010/Attkisson%20Presentation%20012010.pdf>.

²² Ibid.

²³ Information available at <http://floridaosba.org/GenDocs/102009/101609%20Issues%20%20Recommendations.pdf>.

Office of Tourism, Trade, and Economic Development (OTTED) at least 45 days – instead of the current 28 days – before filing the rule for adoption.

- SBRAC may propose regulatory alternatives to the agency within 44 days of receipt of the statement.
- Agencies must then consider the regulatory alternative in a public hearing and either adopt the alternative or provide a statement of the reasons for rejecting it.
- If SBRAC offers an alternative or the agency revises its statement of estimated regulatory costs, the time period for filing the proposed rule for adoption is extended for 45 days, instead of the current 21 days.

Section 2 amends s. 120.541, F.S., to reflect the expanded timeframes an agency has to respond to lower-cost regulatory alternatives it may receive from SBRAC or substantially affected persons, and to clarify the circumstances under which an agency SERC may be challenged.

Specifically, an agency that fails to prepare or revise a SERC pursuant to these new conditions has committed a material failure to follow the state’s rulemaking procedures. However, this does not mean that the proposed rule that should have been the subject of the new or revised SERC is automatically declared invalid, unless:

- The issue is raised in an administrative proceeding within 1 year after the rule’s effective date, and
- The agency’s failure to prepare or revise a SERC materially affects the substantial interests of the person challenging the agency.

Additionally, any rule that is challenged by a substantially affected person because it is an “invalid exercise of delegated legislative authority”²⁴ imposing regulatory costs on a regulated person, city, or county that could be reduced by a lower cost alternative, may not be automatically declared invalid unless:

- The issue is raised in an administrative proceeding within 1 year after the rule’s effective date;
- The challenge is to the agency’s rejection of a lower-cost regulatory alternative pursuant to s.120.541(1)(a), F.S.,²⁵ or under s. 120.54(3)(b)2.b., F.S., related to notification to SBRAC and OTTED that the proposed rule impacts small businesses; and
- The substantial interests of the person challenging the agency on its proposed rule are materially affected by the rejection of the lower cost alternative.

An agency SERC must include the basis for the agency’s decision not to implement a lower-cost regulatory alternative that would reduce the adverse impact on small businesses.

Section 3 amends s. 120.56, F.S., to reflect the expanded timeframe – from 20 days to 44 days – for challenging a proposed rule after a new or revised SERC has been prepared and made available.

The bill also clarifies a provision in this section of law related to the impact of a SERC that has been rejected by DOAH. Currently, when DOAH enters a final order that a SERC violates the

²⁴ Section 120.52(8)(f), F.S.

²⁵ As revised in this legislation, CS/SB 1844.

basic rulemaking requirements of s. 120.54(1)(a), F.S., the agency must discontinue all reliance upon that particular SERC as a basis for agency action. Current law further provides that a SERC must not be construed to impair the obligation of any contracts existing at the time the final order is entered. The bill deletes the prohibition relating to the impairment of contracts, because it is considered an unnecessary statement.

Section 4 amends s. 120.60, F.S., to address an omission in current law of a deadline for when an applicant for a state permit or license must respond to an agency request for additional information. The bill gives agencies authority to establish by rule the time period within which any requested information shall be submitted to the agency, but also requires agencies to grant a request for an extension of that time for good cause shown.

Further, if the applicant believes that the request for additional information is not authorized by law or rule, the agency must proceed to process the application at the applicant's request.

Section 5 specifies that this act shall take effect July 1, 2010.

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. However, if agencies more thoroughly evaluate proposed rules for impacts on small businesses and regulated interests, or agree to adopt lower-cost regulatory alternatives submitted by SBRAC and substantially affected persons then a positive impact could be felt by the private sector.

C. Government Sector Impact:

Indeterminate. However, state agencies could experience a significant fiscal impact if they are required to prepare or revise SERCs for more rules.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 20, 2010:

The CS extends to 45 days the time period in which an agency may file a proposed rule for adoption, if the agency revises its statement of estimated regulatory costs, or if a substantially affected person submits a proposal for a lower cost regulatory alternative.

- B. **Amendments:**

None.