

The Florida Senate

**VETO MESSAGE BILL ANALYSIS**

(This document is based on the enrolled bill, as presented to the Governor.)

Prepared By: The Professional Staff of the Commerce Committee

BILL: CS/CS/HB 1565

INTRODUCER: Economic Development & Community Affairs Policy Council, Governmental Affairs Policy Committee, Rep. Dorworth and others

SUBJECT: Rulemaking

DATE: June 7, 2010 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pugh	Cooper	CM	<b>Withdrawn</b>
2.	_____	_____	GO	<b>Withdrawn</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Florida’s Administrative Procedures Act (APA), ch. 120, F.S., requires each state agency, before the adoption, amendment, or repeal of a rule, to consider the impact of that action on small businesses, small counties, and small cities, as defined in law, and perhaps modify the rule to reflect those impacts. There also are opportunities for undefined “substantially affected persons” to challenge agency rules. Concurrent with the creation of the Small Business Regulatory Advisory Council (SBRAC) in 2008, ch. 120, F.S., was amended throughout to give the SBRAC opportunities to review proposed rules and offer lower-cost regulatory alternatives.

CS/CS/HB 1565 makes a number of significant changes to the APA. The legislation:

- Requires agencies to prepare statements of regulatory costs (SERCs) and economic analyses for certain proposed rules, amended rules, and rule repeals;
- Stays the implementation of rules that trigger economic-development thresholds until the Legislature has had an opportunity to review and ratify them; and
- Gives “substantially affected persons” additional time to review rules and submit lower-cost regulatory alternatives to the agencies.

This legislation substantially amends ss. 120.54 and 120.541, F.S.

**II. Present Situation:**

The Administrative Procedures Act (APA)

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, the APA was created to provide parties in administrative proceedings with

procedural protection and due process.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.<sup>5</sup>

#### Analysis of Regulatory Costs

As part of the administrative rulemaking process, agencies may develop a statement of estimated regulatory costs (SERC) for its rules. The SERC must include:<sup>6</sup>

- 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 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.

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<sup>1</sup> 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

<sup>2</sup> 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).

<sup>3</sup> 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)).

<sup>4</sup> Rigot, *supra* note 2, at 14.

<sup>5</sup> *Id.*

<sup>6</sup> Section 120.541(2), F.S.

Any substantially affected person,<sup>7</sup> or the Small Business Regulatory Advisory Council (SBRAC),<sup>8</sup> 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 deadlines<sup>9</sup> 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, the process is as follows:

- 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.<sup>10</sup>
- 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 (OPPAGA) to determine whether the rejected alternatives reduce the impact on small businesses and still meet the stated objectives of the proposed rule.

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<sup>7</sup> Section 120.541(1), F.S.

<sup>8</sup> Section 120.54(3)(b)2.b.(II), F.S.

<sup>9</sup> Section 120.541(1)(c), F.S.

<sup>10</sup> Section 120.54(3)(b), F.S.

- 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.

### JAPC's Role

As a check on legislatively created authority, JAPC<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

<sup>11</sup> Section 120.545, F.S.

<sup>12</sup> See s. 120.545(1), F.S.

<sup>13</sup> See s. 120.545(2), F.S.

<sup>14</sup> See s. 120.545(3)(c), F.S.

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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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

#### Legislative ratification of rules

Four existing Florida statutes specifically require legislative ratification of rules:

- s. 316.2937, F.S., related to motor vehicle emissions standards;
- s. 366.92, F.S., related to a state renewable energy policy;
- s. 373.4211, F.S., related to wetlands delineation; and
- s. 373.4145, F.S., related to imposition of an environmental resource permitting program in the Northwest Florida Water Management District.

The Legislature ratified and approved as consistent with legislative intent state rules regulating securities brokers, in s. 517.1205, F.S.

#### SBRAC

Created in 2008,<sup>20</sup> 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. SBRAC currently has three full-time staff and two part-time interns and is housed administratively within the Florida Small Business Development

<sup>15</sup> See s. 120.545(4), (5), and (6), F.S.

<sup>16</sup> See s. 120.545(8), F.S.

<sup>17</sup> See s. 120.545(8)(b)1., F.S.

<sup>18</sup> Section 120.545(8)(b)2., F.S.

<sup>19</sup> Section 120.545(8)(d), F.S.

<sup>20</sup> 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>.

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:<sup>21</sup>

- 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.

### III. Effect of Proposed Changes:

CS/CS/HB 1565 makes a number of significant changes to ch. 120, F.S., related to when agencies must prepare SERCs; what information those SERCs must evaluate; the Legislature's role in reviewing and acting on proposed rules that impact economic-development issues; and how much time persons substantially affected by a rule have to review it and to submit an alternative.

**Section 1** amends s. 120.54, F.S., to require agencies to prepare SERCs on any proposed rule that either has an *adverse* impact (rather than simply an impact, as expressed in previous law) on small business, or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in Florida within 1 year after implementation of the rule. The term "regulatory costs" is not defined, but implies adverse impacts on the private-sector and individuals, not only small businesses.

The bill amends s. 120.54(4)(c), F.S., to provide that emergency rules are only effective for 90 days and not renewable *unless* the agency has initiated rulemaking on the subject of the emergency rule and either:

- A filed challenge to the proposed rules remains pending; or
- The proposed rules are awaiting ratification by the Legislature.

**Section 2** amends s. 120.541, F.S., to make a number of changes, such as extending certain deadlines, establishing thresholds for SERC review, and involving the Legislature in reviewing and acting on proposed rules. It deletes or rearranges existing provisions related to when a rule may be declared invalid to reflect the changes to this section of law.

The language in **Section 1** referring to the \$200,000 threshold of impact is repeated in this section. Additionally, an agency would be required to revise its SERC if any further change to the proposed rule increases regulatory costs. At least 45 days before filing a proposed rule for final adoption, an agency must provide a copy of its revised SERC to the person who submitted

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

the lower cost regulatory alternative and to JAPC, and provide notice on its website that the document is available to the public.

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, notwithstanding provisions in s. 120.56(1)(c), F.S., that allow an agency to rebut charges that it has committed a material failure.

Additionally, any rule that is challenged by a substantially affected person because it is an "invalid exercise of delegated legislative authority"<sup>22</sup> 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:

- This 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.,<sup>23</sup> or under s. 120.54(3)(b)2.b., F.S., related to notification to SBRAC 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.

Section 120.541(2)(a), F.S., is amended to require SERCs to include an economic analysis of whether the proposed rule, directly or indirectly:

- Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1 million in the aggregate within 5 years after implementation of the rule;
- Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in Florida to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after implementation of the rule; or
- Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after implementation of the rule.

Additionally, SERC's must include:

- Any transactional costs likely to be incurred by individuals, entities, or small businesses, "any other costs necessary to comply with the rule;"
- The basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses; and
- A description of any regulatory alternatives, rather than "good faith written proposals," submitted by the parties *and* a statement by the agency that it is adopting the alternative or giving the reasons why it is rejecting the alternative.

Emergency rules adopted pursuant to s. 120.54(4), F.S., or federal standards adopted pursuant to s. 120.54(6), F.S., are exempt from this new economic analysis component of the SERC.

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<sup>22</sup> Section 120.52(8)(f), F.S.

<sup>23</sup> As revised in this legislation.

A new subsection (3) is created in s. 120.541, F.S., to require that any proposed rule which has an adverse impact or regulatory costs in excess of the criteria listed above may not go into effect until it is ratified by the Legislature. In such cases, the rule must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session.

**Section 3** amends s. 120.56(2)(a), F.S., to allow a person substantially affected by a proposed rule to challenge the rule within 44 – rather than 20 – days after the SERC or revised SERC has been prepared and made available.

**Section 4** amends s. 120.60(1), F.S., to provide that an agency may establish by rule the time period for submitting any additional information requested by the agency related to licensing. For good cause shown, the agency must grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, must proceed to process the application.

**Section 5** provides this act takes effect upon becoming law.

#### **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.

C. Government Sector Impact:

Indeterminate. State agencies may see an increase in work load due to preparation or revision of SERCs. It also may make agency rulemaking more expensive, by requiring

economic analysis of certain types of rules for which many agencies may not have staff expertise.

Delaying implementation of rules could have fiscal impacts on agency budgets and operations because of extensions for review because of the 24-day extension to file a challenge to any rule with a SERC or revised SERC, and for rules requiring legislative ratification.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Veto:**

**A. Governor's Stated Reason for Veto:**

In a letter<sup>24</sup> dated May 28, 2010, to the Secretary of State, Governor Crist wrote the following reasons he vetoed CS/CS/HB 1565:

- The bill “encroaches on the principle of separation of powers.”
- If it becomes law, “nearly every rule may have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida’s economy.”

**B. Professional Staff Comments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>24</sup> On file with the Senate Commerce Committee.