

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RRS 11-02a Administrative Procedures

SPONSOR(S): Rulemaking & Regulation Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking & Regulation Subcommittee	12 Y, 0 N	Miller	Rubottom

SUMMARY ANALYSIS

The bill creates a one-time process requiring all agencies to undertake a three-year review of the economic impact of all rules effective on or before November 16, 2010. This follows the pattern of the comprehensive review of statutory authority conducted after the 1996 substantive amendments to the Administrative Procedures Act (APA). Additionally, the bill requires each agency to identify all revenue rules and all rules under which the agency requires data reporting from external sources. The report will include the statutes authorizing the data collection, how the data is used by the agency, and the policies advanced by the program.

The bill creates s. 120.74(3), requiring agencies annually to report to the Legislature their intended rulemaking for the next fiscal year, excluding emergency rulemaking, and s. 120.74(4), modifying existing reporting requirements during the comprehensive review period.

New s. 120.745 creates the comprehensive review and reporting for older rules, including preparation of economic analyses to identify all rules that meet the same criteria that, for rules proposed after 11/16/2010, would require legislative ratification.

The bill also creates s. 120.7455, stating the Legislature may conduct an internet-based public survey about the impact of rules, laws, ordinance, and regulations on the ability of Floridians to engage in lawful conduct. This new section also provides use immunity from prosecution or enforcement actions for participating in the survey as well as protection from retaliatory agency enforcement actions arising out of a person's providing information to the Legislature.

Those local governmental entities or officers included under the APA by special law are excluded from the comprehensive review required under new s. 120.745.

The comprehensive review will continue through the 2014 regular session of the Legislature to provide sufficient time for the agencies to conduct the review and for public participation, legislative consideration of the reports, and any action the Legislature chooses to take. The bill provides that the section creating the one time review is automatically repealed unless amended or extended by the Legislature.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Rulemaking Authority

Chapter 120, F.S., the Administrative Procedures Act (APA), establishes the process for administrative rulemaking. With the enactment of HB 1565 in November, 2010,¹ the Legislature amended the APA to control more closely the adoption of rules with significant economic impacts.

A rule is an agency statement of general applicability which 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 Legislature³ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”⁴ a rule. Agencies do not have discretion whether to engage in rulemaking.⁵ To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.⁶ The grant of rulemaking authority itself need not be detailed.⁷ 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.⁸

The rulemaking requirements of the APA apply to “agencies,” defined by s. 120.52(1), F.S. Agencies include executive branch entities acting pursuant to powers other than those derived from the constitution. In addition to the Governor and Cabinet officers, the APA applies to a wide variety of entities with statewide or regional authority, such as all departments and entities specified in s. 20.04, F.S., the Board of Governors of the State University System, and regional water supply authorities, to local entities such as school districts or those specifically made subject to the APA.⁹

The development of the APA parallels the Legislature’s refinement of the strictures regulating the exercise of delegated authority by executive branch agencies. The initial version of the APA in 1974 provided a process for public adoption and adjudication of agency rules.¹⁰ A year later the Legislature first required agencies to provide a statement of estimated economic impact in the notice of initial rulemaking.¹¹ By the early 1990s the Legislature became increasingly concerned about the economic costs of agency rules and amended the APA to compel preparation of economic impact statements under certain circumstances.¹²

¹ HB 1565 was passed during the 2010 regular session but was vetoed by Governor Crist. On November 16, 2010, the Legislature in special session voted to override that veto and the bill became law as Chapter 2010-279, with an effective date of November 17, 2010.

² s. 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

⁴ s. 120.52(17), F.S.

⁵ s. 120.54(1)(a), F.S.

⁶ s. 120.52(8) & s. 120.536(1), F.S.

⁷ *Save the Manatee Club, Inc.*, supra at 599.

⁸ *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).

⁹ The comprehensive list of entities is found in the definition at s. 120.52(1), F.S. There are certain exclusions for municipalities and municipality-created entities.

¹⁰ Ch. 74-310, Laws of Florida.

¹¹ Ch. 75-191, s. 3, Laws of Florida, amending s. 120.54(1), F.S. (Supp. 1974).

¹² Ch. 92-166, s. 4, Laws of Florida, amending s. 120.54(2)(b), F.S. (1991). See also Patricia Nelson, “Now What Do We Do? An Agency Perspective on Rulemaking After HB 1565 (and Executive Order 11-01),” *The Florida Bar Administrative Law Section Newsletter*, Vol. XXXII, No. 3 (March 2011). The article presents a good overview of the history of economic analysis under the APA and presents one agency’s approach to implementing the requirements of s. 120.541(2)(a), F.S.

The Legislature also determined greater clarity was required to guide and constrain agencies in exercising delegated authority. A comprehensive revision of the APA became law in 1996¹³ expressly limiting rulemaking only to those areas where agencies had both the power to make rules and a substantive statute providing specific guidelines for those rules. To ensure all agency rules conformed with this standard of authority, the Legislature required every agency to review the express legal authority for each rule of the agency and to repeal those which lacked proper authority, over a period of three years.¹⁴ Further clarification of the rulemaking authority was enacted in 1999 and the process for reviewing the substantive authority for rules was extended into 2001.¹⁵

These initial review requirements were fulfilled and the reporting requirement was modified into an ongoing requirement. Agencies now are required to review their rules and perform the following:

- Identify and correct deficiencies;
- Clarify and simplify rules;
- Delete obsolete or unnecessary rules;
- Delete rules that are redundant of statutes;
- Improve efficiency, reduce paperwork, decrease costs to government and the private sector;
- Confer with agencies having concurrent jurisdiction and determine whether their rules can be coordinated; and
- Determine whether rules should be amended or repealed to reduce the impact on small business while meeting the stated objectives of the proposed rule.¹⁶

By October 1 of each odd-numbered year, each agency must file a report with the Speaker, the President, the Joint Administrative Procedures Committee (JAPC), and each substantive committee of the Legislature, certifying compliance with the statute and providing the following information:

- Changes made to the agency's rules as a result of the review;
- Recommended statutory changes to promote efficiency, reduce paperwork, or decrease costs to government and the private sector;
- The economic impact of the rules on small business;
- The types of cases or disputes in which the agency is involved which should be conducted under the summary hearing process described in s. 120.574, F.S.¹⁷

Economic Review

With the development of stricter standards for exercising rulemaking authority the Legislature also imposed more comprehensive requirements for agencies to address the economic effect of their rules. By 1992 the Legislature had imposed specific elements for inclusion in economic impact statements, developed criteria for agencies to follow in considering the impact of a rule on small businesses, and required agencies to tier their rules in order to lessen economic impacts on small business.¹⁸ The 1996 act expanded the criteria both for considering the impact on small business as well as preparing a more comprehensive statement of estimated regulatory costs.¹⁹ Agencies also were required to consider lower cost alternatives to the proposed rule.²⁰ Preparation of a statement of estimated regulatory costs (SERC) was mandatory only in response to the filing of a lower cost alternative by a substantially affected party.²¹

¹³ Ch. 96-159, Laws of Florida.

¹⁴ Ch. 96-159, s. 9, Laws of Florida.

¹⁵ Ch. 99-379, s. 3, Laws of Florida.

¹⁶ s. 120.74(1), F.S.

¹⁷ s. 120.74(2), F.S. Section 120.574, F.S., provides a summary procedure for administrative hearings if the parties agree.

¹⁸ s. 120.54(2), F.S. (Supp. 1992).

¹⁹ Ch. 96-159, s. 10, Laws of Florida.

²⁰ s. 120.54(3)(b)2.b., F.S. (Supp. 1996).

²¹ Ch. 96-159, s. 11, Laws of Florida, creating s. 120.541, F.S.

Statutory amendments in 2008 mandated preparation of a SERC if the agency's rule would affect small businesses.²² In the same act the Legislature created the Small Business Regulatory Advisory Council²³ (SBRAC). The primary role of SBRAC is to review existing and proposed agency rules and to advocate for minimizing adverse impacts and economic hardship on small businesses.²⁴

The enactment of HB 1565 further increased legislative oversight of agency rulemaking by creating specific economic thresholds for stricter accountability. For all rulemaking initiated on or after November 17, 2010, s. 120.54(3)(b)1. and s. 120.541(1)(b), F.S., require agencies to prepare a SERC if the proposed rule either will have an adverse impact on small businesses or if the rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in the first year after the rule is implemented. Section 120.541(2)(a), F.S., now requires a complete SERC to include an economic analysis addressing whether the rule is likely to have one of three specific impacts, directly or indirectly, in excess of \$1 million in the aggregate within 5 years of going into effect:

- An adverse impact on economic growth, private sector job creation or employment, or private sector employment;
- An adverse impact on business competitiveness, including competition with interstate firms, productivity, or innovation; or
- An increase in regulatory costs, including transactional costs.

The criteria under s. 120.541(2)(a), F.S., creates the threshold for required legislative ratification under s. 120.541(3), F.S. If the economic analysis required for the SERC finds the rule is likely to have one of the foregoing impacts, the rule cannot become effective unless submitted to the Speaker and the President and ratified by the Legislature.

The requirements of HB 1565 apply only to rules which had not become effective as of November 17, 2010, or are proposed for adoption after that date.²⁵ Rules which went into effect between July 1, 2008 and November 16, 2010, were subject to greater scrutiny about their potential costs to small businesses and Florida's economy due to the increased criteria for statutory review and the participation of SBRAC. For rules which went into effect before July 1, 2008, agencies only had to prepare a SERC if a party offered a lower cost alternative or the rule impacted small businesses.

Governor Scott's first executive order²⁶ created the Office of Fiscal Accountability and Regulatory Reform (OFARR) and mandated each agency under the Governor's authority to conduct a comprehensive review of all that agency's rules. To date the Governor's agencies have identified over 750 rules which may be repealed.²⁷ While certain economic factors are included in this review, Executive Order 11-01 does not compel the same level of analysis required for a SERC under s. 120.54(3)(b) and s. 120.541(2), F.S.²⁸

Effect of Bill

The bill improves legislative oversight of administrative rulemaking with three general modifications of the APA:

²² Ch. 2008-149, s. 7, Laws of Florida, amending s. 120.54(3)(b)1., F.S.

²³ s. 288.7001, F.S.

²⁴ s. 288.7001(3)(c), F.S.

²⁵ The APA distinguishes between a rule being "adopted" and being enforceable or "effective." s. 120.54(3)(e)6, F.S. Before a rule becomes "effective" the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

²⁶ EO 11-01.

²⁷ Presentation of Patricia Nelson, Deputy Director of OFARR, at March 23, 2011 meeting of Rulemaking & Regulation Subcommittee.

²⁸ Id.

- The bill adds subsection 120.74(3), requiring agencies annually to prepare a regulatory plan of projected rulemaking, excluding emergency rulemaking, and to report these plans to the Legislature. Subsection 120.74(4) is also added to adjust certain reporting requirements to coordinate with the reports required under new s. 120.745.
- The bill creates s. 120.745, requiring all agencies to conduct a comprehensive review of their rules, identify those rules in effect on or before November 16, 2010 (the day before the ratification requirement went into effect) which have one of the significant economic impacts of over \$1 million as stated in s. 120.541(2)(a), F.S., complete modified economic reviews of all such rules over a two year period, and provide annual reports to the Legislature. Agencies must also identify and justify rules requiring data submissions from third parties. This provision will expire on July 2, 2014 without further Legislative action.
- The bill creates s. 120.7455, creating the format for a Legislative project to gather information on burdensome administrative rules and providing use immunity and protections from agency retaliation to those parties who participate in the survey. This provision will continue in effect in order to preserve the provided immunity and protections.

S. 120.74(3): Annual Regulatory Plan and Report

Section 120.74, F.S., requires agencies to conduct a biennial review of their rules and report on specific topics to the Speaker, President, and JAPC. Section 5 of EO 11-01 requires each agency under the authority of the Governor to prepare by July 1 of each year a regulatory plan identifying rulemaking the agency expects to pursue in the next fiscal year. The bill codifies this reporting planning requirement for all agencies and provides for annual reporting to the Speaker, President, and JAPC.

S. 120.74(4): Modification of Biennial Reporting Requirement During Effective Period of s. 120.745

The comprehensive review provided in new s. 120.745 coincides with the biennial reviews and reports required under s. 120.74, F.S. This new subsection (4) avoids duplication of effort on the part of the agencies by integrating elements of the report due in 2011 with the more comprehensive report due under s. 120.745(4) and by suspending the biennial report in 2013 due to the detailed reports due in 2012 and 2013 under s. 120.745(6).

S. 120.745: Comprehensive Rule Review with Emphasis on Economic Effects

After the 1996 substantive amendments to the APA, the Legislature adopted a one-time review process for all existing rules. Agencies were given a specific time in which to review their rules for compliance with the substantive law authorizing the rule. Similarly, the bill requires a review of existing rules to ensure conformity with the Legislature's expressed intent to minimize the adverse impacts of agency rulemaking on Florida's economy.

The review and reporting process begins in 2011 and ends in 2013. All agencies will be required to review and categorize their rules and provide a comprehensive report to the Speaker, President, and JAPC by December 1, 2011. For rules in effect on or before November 16, 2010, which the agency wants to retain without amendment, and which have or are projected to have one of the \$1 million fiscal impacts delineated in s. 120.541(2)(a), F.S., the agencies are required to divide such rules into two reporting groups: one group to be analyzed and reported by December 1, 2012 (Group 1), and the other by December 1, 2013 (Group 2). For each rule in these Groups the agency shall prepare a compliance economic review incorporating specific information required by the new statute. The bill provides for periods of public comment on the rules to be listed in Group 1 or Group 2 and on the resulting economic reviews, including opportunities to suggest lower cost regulatory alternatives to the existing rule. Comprehensive reports of these economic reviews will be due to the Speaker, President, and JAPC by the above dates. The Legislature thus will receive updated economic evaluations of older rules and may decide what action to take, if any.

The APA definition of “agency” includes most state governmental entities, including constitutionally-created bodies such as the Fish and Wildlife Conservation Commission and regional bodies such as water management districts. Most local governments are exempt but some may be included by special law.²⁹ Section 120.745(1)(a) will exclude local governments made subject to the APA only by special law³⁰ from the comprehensive review process. This recognizes the disparity in resources available to these local governmental units as opposed to entities receiving state funding and which enact rules having a regional or statewide impact.

Rules identified for repeal or amendment will not require the economic reviews created under the bill because either action requires compliance with the current economic analysis procedures in the APA.³¹

In addition to the review and identification of rules by December 1, 2011 based on economic effects, agencies must identify those rules defined as having an impact on state revenues. Agencies must also identify and support defined “data collection rules” which they intend to retain. A number of agency rules require non-governmental entities such as service providers or workers compensation insurance carriers to report certain data to the agency. Because of the economic impact on Florida businesses of these various data reporting requirements, the bill requires each agency to report all rules mandating such data reporting. The December 1, 2011 report will include the statutes authorizing the data collection, how the data is used by the agency, and the policies supporting continuation of the program.

The bill requires public notice of completing reports, listing of rules in Group 1 or Group 2, completing compliance economic reviews, and resolving public objections. Proposed s. 120.745(7) provides exclusive publication requirements, relying primarily on electronic postings on the websites of the agencies. Publication required under s. 120.745 will be deemed complete as of the date the required notice, determination or report is published on the agency’s website. Agencies must post the full text of documents required under s. 120.745 using links on their respective websites. Once a week each agency will provide the Department of State with copies of all notices published in the previous week on the agency’s Internet website for publication in the Florida Administrative Weekly.

To avoid unnecessary duplication of effort, the bill exempts from the compliance economic review those rules for which the agency completed the review process implemented under EO 11-01, but only if the review under EO 11-01 found the rule did not:

- Adversely affect the availability of business services;
- Adversely affect job creation or retention;
- Place unreasonable restrictions on access to employment; or
- Impose a significant regulatory related cost.

Further, an agency’s certification of its biennial review under s. 120.74, F.S., may omit any information included in the reports provided under s. 120.745, the reporting date is extended to December, 2011, and the biennial reporting requirement is excluded for 2013. To further assist agencies in preparing the report required in 2011, the bill provides a model reporting chart. These provisions are intended to streamline the review and reporting process for agencies.

The review proceeds through the 2014 regular session of the Legislature to provide sufficient time for the agencies to conduct the comprehensive review and for public participation, legislative consideration of the reports, and any action the Legislature chooses to take. The bill excludes agency proceedings to repeal rules identified under s. 120.745 from the requirement to prepare a statement of estimated regulatory costs under s. 120.54 and s. 120.541.³²

²⁹ s. 120.52(1), F.S.

³⁰ s. 120.52(1)(c), F.S. The statute excludes from the APA officers and governmental entities with jurisdiction over one county or less unless the officer or entity is expressly made subject to the APA by general law, special law, or existing judicial decision. The full definition of “agency” also excludes a number of specific entities, principally municipalities.

³¹ s. 120.54(3)(d)5., Fla. Stat.

³² Under s. 120.54(3)(d)e, F.S., agencies must use the same procedure to repeal rules as to adopt them, including the potential for mandatory preparation of a statement of estimated regulatory costs under s. 120.54 and s. 120.541, F.S.

Timeline for Review and Reporting

The following summarizes the timeline of required reporting under s. 120.745.

Completion Date	GROUP 1 RULES	GROUP 2 RULES
12/1/2011	<p>Agency reports results of biennial s. 120.74 review & review under s. 120.745(3).</p> <ul style="list-style-type: none"> • Report includes: <ul style="list-style-type: none"> ○ All rules defined in s. 120.745 as “revenue rules.” ○ All “data collection rules,” together with authorizing statute(s), uses of date reported, and policies supporting continuation of reporting program. ○ Rules to be repealed. ○ Rules to be amended. ○ Each rule effective on or before 11/16/2010, which the agency does not plan to repeal or amend before 12/31/2012, and which probably will have one of the effects in s. 120.541(2)(a) for the 5 year period beginning 1/1/2010. ○ Rules included in Group 1 and those included in Group 2. • Publish list of Group 1 and Group 2 Rules. • Begin consideration of objections to non-inclusion of rules in economic review schedule. 	Publish list of Group 2 Rules.
5/1/2012	<p>Agencies complete compliance economic reviews for Group 1.</p> <ul style="list-style-type: none"> • Submit to SBRAC • Publish notice of Group 1 Rules for which compliance economic reviews were prepared • Begin public input of Lower Cost Regulatory Alternatives (LCRA) on Group 1 economic reviews. 	
6/1/2012	D/L for public objections to non-inclusion of rules in economic review schedule.	
6/15/2012	D/L for public to submit Lower Cost Regulatory LCRA for any Group 1 Rule.	
6/21/2012	Latest day for agencies to publish determination on public objections to non-inclusion of rules in economic review schedule.	
7/1/2012	<ul style="list-style-type: none"> • Latest day for agencies to publish notice of correcting report in response to sustaining an objection to non-inclusion in economic review schedule. 	
	<i>First annual regulatory plan submission under s. 120.74(3).</i>	
8/1/2012	D/L for SBRAC to submit LCRAs	
12/1/2012	<ul style="list-style-type: none"> • Agencies publish final reports of Group 1 compliance economic reviews. • Begin 120.54 rulemaking for Group 1 Rules 	

Completion Date	GROUP 1 RULES	GROUP 2 RULES
	listed for amendment or repeal.	
5/1/2013	Last week of 2013 Regular Session during which: <ul style="list-style-type: none"> Legislature may review reports of Group 1 rule reviews. Legislature may act with respect to retained Group 1 rules. 	Agencies complete compliance economic reviews for Group 2. <ul style="list-style-type: none"> Submit to SBRAC Publish notice of rules for which compliance economic reviews were prepared, period for public input.
6/15/2013		D/L for public to submit Lower Cost Regulatory Alternatives for any Group 2 rule (LCRA)
7/1/2013	<i>Second annual regulatory plan submission under s. 120.74(3).</i>	
8/1/2013		D/L for SBRAC to submit LCRAs
12/1/2013		Agencies publish final reports of Group 2 compliance economic reviews. <ul style="list-style-type: none"> Begin 120.54 rulemaking for Group 2 Rules listed for amendment or repeal.
5/1/2014		Last week of 2014 Regular Session during which: <ul style="list-style-type: none"> Legislature may review reports of Group 2 rule reviews. Legislature may act with respect to retained Group 2 rules.
7/2/2014	<i>s. 120.745 stands repealed by terms of the act unless extended by the Legislature.</i>	

S. 120.7455: Legislative survey of Regulatory Impacts

The bill creates s. 120.7455, providing notice that from the effective date of the act to July 2, 2014, the Legislature may implement an internet-based public survey about the impact of regulatory rules in Florida, including the number and nature of regulations and permitting requirements affecting Floridians. Types of information which may be requested include the name of the business as registered in Florida, the number and identification of the agencies regulating the respondent's lawful activities, the number of permits, licenses, or registrations required for the respondent to engage in a lawful activity, and laws, rules, ordinances, or regulations the respondent alleges to be unreasonably burdensome. To encourage participation and candor in any such survey, the new section provides use immunity from prosecution based on either the act of responding or the information provided. This section also protects survey respondents from retaliatory acts of an agency based on providing or withholding information in the survey by allowing evidence of retaliatory conduct in mitigation of any proposed sanction, resulting in the presiding judge awarding the minimum of sanctions authorized by the Legislature.

Self-Repeal

Under s. 5 of the bill, s. 120.745 will stand repealed as of July 2, 2014.

B. SECTION DIRECTORY:

Section 1: Creates new s. 120.74(3), requiring all agencies to adopt an annual regulatory plan and file the plan with the Speaker, President, and JAPC. Creates new s. 120.74(4), modifying the biennial review and reporting requirements of s. 120.74, F.S., for the years 2011 and 2013.

Section 2: Creates new s. 120.745, requiring all agencies to review all of their rules in effect on or before November 16, 2010, and submit such rules meeting the \$1 million over 5 years criteria in s. 120.541(2)(a), F.S., for legislative consideration.

120.745(1): Creates specific definitions for review process. Excludes certain local governmental entities from the comprehensive review requirement.

120.745(2): Requires each defined agency to perform an Enhanced Biennial Review of all rules in effect. Combines the review and report due under s. 120.74 with a one-time review of all rules in effect on or before 11/16/2010. Requires identifying and dividing those requiring further economic review into Groups 1 and 2. Extends biennial review reporting date to December 1, 2011.

120.745(3): Specifies the form and content of report of Enhanced Biennial Review and requires publication in the manner provided in s. 120.745(7).. Requires publication of separate lists of Group 1 and Group 2 rules, and directions on how and where to file objections.

120.745(4): Creates process for public objection of agency decision on whether rule should be designated for economic review. Provides the agency's decision is final on whether rule is subject to compliance economic review.

120.745(5): Requires compliance economic analysis for all rules listed in Group 1 or Group 2 as probably exceeding the \$ 1 million thresholds in s. 120.541(2)(a), F.S. Provides for publication of completed reviews and period for public submission of lower cost regulatory alternatives. Exempts certain rules reviewed under the Governor's EO 11-01 unless certain specific adverse effects are found in the course of such review. Requires filing of comprehensive final reports with the Speaker, President, and JAPC: by December 1, 2012 for Group 1 rules; by December 1, 2013, for Group 2 rules. For rules designated for repeal or amendment in Group 1 or 2 reports, requires initiating of proceedings. Exempts agency proceedings to repeal rules identified in reports filed under s. 120.745(5) from the requirement to prepare a statement of estimated regulatory costs.

120.745(6): References authority of Legislature to choose whether to act on information reported.

120.745(7): Creates specific provisions for notice and publication under the act. Includes specific directives for Internet URL addresses for publications of reports, determinations and notices.

Section 3: Creates s. 120.7455, providing for Internet-based public survey to collect information on rules, laws, ordinances, and regulations which impact the lawful activities of respondents, including unreasonably burdensome rules. Provides for use immunity and protection from retaliatory agency conduct for survey participants.

Section 4: Leaves unchanged the legal status of any rule determined to be invalid. This prevents any agency from using the process of review and submission to the Legislature to override a legal decision invalidating a rule.

Section 5: Section 2 of the act creating s. 120.745 will stand repealed on July 2, 2014.

Section 6: Effective date of law is July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: No new revenue sources are created in the bill.
2. Expenditures:

Costs of review to agencies are indeterminate. By reducing duplication of activities for the agencies in allowing OFARR to designate rules already reviewed as a result of EO 11-01, and integrating the 2011 report with the review already required under s. 120.74, F.S., the costs for the comprehensive review in 2011 should be reduced. The agencies will experience increased costs in completing a compliance economic analysis required for each rule being retained without amendment and which is likely to meet the criteria of s. 120.541(2)(a), F.S. An estimate of any significant compliance review costs should be available for consideration in the 2012 Regular Session and ought to be included in agency budgets for FY-2013 and FY-2014. The cost of reporting will be reduced in 2013 by eliminating the rules review and report under s. 120.74, F.S., for that year.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: No new revenues are generated under this bill.
2. Expenditures:

Those local governments subject to the APA will incur costs for the comprehensive review and report, subsequent economic analysis and reports, and costs to repeal rules. The bill excludes local governments made subject to the APA only by special law from s. 120.745 and these local governments will not incur such costs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill creates no direct economic impact on private sector interests. The bill is intended to help identify existing significant private and public economic impacts imposed by agency rules, enabling the public and the Legislature to better evaluate the benefits of programs administered by such rules.

D. FISCAL COMMENTS: No additional comments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities. Local governments subject to the APA are under the economic review requirements for rulemaking in s. 120.54 and 120.541, F.S., the ratification requirement of s. 120.541(3), F.S., and the biennial review and reporting requirement of s. 120.74, F.S. The required comprehensive review in s. 120.745 is an extension of the regulatory oversight to which these entities already are subject. Excluding smaller governmental entities, with jurisdiction over one county or less and made subject to the APA only by a special law, prevents the imposition of a statewide comprehensive process solely due to the ancillary effect of a special law.

2. Other: No other constitutional issues appear.

Use immunity is not uncommon in criminal investigations and in Congressional investigations.³³ General law may limit the power of the state to use evidence or prosecute violators of laws and rules.

B. RULE-MAKING AUTHORITY: The bill does not grant rulemaking authority because none is needed. The bill provides the procedure to be followed by agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

³³ See, 18 U.S.C. §§ 6001 *et seq.* (Federal statutory provisions.) For a concise discussion of the issues see, *The Power To Compel Testimony and Disclosure*, found on 4/7/11, at <http://supreme.justia.com/constitution/amendment-05/08-power-to-compel-testimony-and-disclosure.html>.

The bill provides for July 2, 2014, repeal of certain provisions. That date should be changed to July 1, 2014.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 5, 2010, the Rulemaking & Regulatory Subcommittee adopted a strike-all amendment which differed from the initial published draft of PCB RRS 11-02a. Changes included:

- Adjusting the required filing of annual regulatory plans by agencies with the Speaker, the President, and JAPC to begin in 2012;
- Revising and reducing the elements to be included in the compliance economic reviews to be performed under the bill and requiring the 5 year period for the estimate described under s. 120.541(2), F.S., to begin on January 1, 2010;
- Deleting language indicating the legislative purpose for the section as redundant of terms of proposed s. 120.745;
- Streamlining the initial process for reviewing and categorizing an agency's rules to better integrate the required 2011 report with the requirements of s. 120.74;
- Revising the period for public objections to the listing of rules scheduled for further economic review to 6 months for all interested parties;
- Streamlining the compliance economic review process by exempting from further economic review those rules for which the Governor's Office of Fiscal Accountability and Regulatory Reform (OFARR) review found no specified adverse economic consequences and by revising the substantial reporting requirements to make the reports uniform for 2012 and 2013;
- Revising certain publication requirements;
- Deleting a provision for automatic repeal of rules reported as appropriate for repeal and restructuring an exemption from both the SERC requirement of s. 120.54 and all of s. 120.541, F.S., for proceedings to repeal rules identified by the reports required under s. 120.745;
- Renumbering the sections.
- This analysis reflects the changes made by the amendment.