

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	SB 7028	<b>FINAL HOUSE FLOOR ACTION:</b>		
<b>SUBJECT/SHORT TITLE</b>	Ratification of Department of Elderly Affairs Rules	108	Y's 1	N's
<b>SPONSOR(S):</b>	Rules	<b>GOVERNOR'S ACTION:</b>		Approved
<b>COMPANION BILLS:</b>	None			

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**SUMMARY ANALYSIS**

SB 7028 passed the House on March 9, 2018.

The bill ratifies Rule 58A-5.036, F.A.C., so that the rule may go into effect.

Under ch. 120, F.S., the Administrative Procedures Act, the formal rulemaking process begins by an agency giving notice of the proposed rule. The notice is published by the Department of State in the Florida Administrative Register and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule. Section 120.541, F.S. requires that any rule with an adverse economic impact exceeding \$1 million over the first 5 years the rule is in effect must be ratified by the legislature to be effective.

Rule 58A-5.036, F.A.C., requires, by June 1, 2018, currently licensed assisted living facilities (ALFs) to maintain an alternative power source that can air-condition an area of no less than 20 net sq. ft. per resident at a temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The rule requires the ALFs to keep fuel on-site or use piped natural gas. The rule allows ALFs under common control that are located on a single campus to share fuel, alternative power sources, and resident space. The rule also allows the Agency for Health Care Administration to grant an extension to comply with the requirements until January 1, 2019, for ALFs that can show delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes.

The SERC developed for Rule 58A-5.036, F.A.C., shows that the rule will create an adverse economic impact of \$243,912,720 over the first 5 years the rule is in effect. Because the rule has an adverse economic impact on the ALF industry exceeding \$1 million over the first 5 years it is in effect, it must be ratified by the Legislature to be effective.

The bill will have a significant negative fiscal impact on ALFs that need to acquire an alternative power source to meet the requirements of the rule. The bill has a negative fiscal impact on state government and no fiscal impact on local governments.

The scope of the bill is limited to this rulemaking procedure and does not adopt the substance of the rule into statute.

The bill was approved by the Governor on March 26, 2018, ch. 2018-122, L.O.F., and became effective on that date.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** s7028z1.HHS

**DATE:** March 28, 2018

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Present Situation

#### Rulemaking Authority and Legislative Ratification

Rulemaking authority is delegated by the Legislature<sup>1</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>2</sup> a rule.<sup>3</sup> To adopt a rule an agency must have a general or specific grant of authority from the Legislature to implement a specific law through rulemaking.<sup>4</sup> The grant of rulemaking authority itself need not be detailed.<sup>5</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>6</sup>

The Florida Administrative Procedures Act, Ch. 120, F.S., governs the rulemaking process. The formal rulemaking process begins by an agency giving notice of the proposed rule.<sup>7</sup> The notice is published by the Department of State in the Florida Administrative Register<sup>8</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule.

A SERC must be prepared if the proposed rule will have a negative impact on small business or if the proposed rule is likely to directly or indirectly increase the total regulatory costs by more than \$200,000, within one year of the rule’s implementation.<sup>9</sup> The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>10</sup> The SERC must analyze a rule’s potential impact over the 5 year period from when the rule goes into effect. The economic analysis should show whether the rule, directly or indirectly is:

- Likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;<sup>11</sup>
- Likely to have an adverse impact on business competitiveness,<sup>12</sup> productivity, or innovation;<sup>13</sup>
- Likely to increase regulatory costs, including any transactional costs.<sup>14</sup>

The law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>15</sup> A rule must be filed for adoption before it may go into effect<sup>16</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>17</sup> A rule may be adopted but cannot go into effect if the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate

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

<sup>2</sup> Section 120.52(17), F.S.

<sup>3</sup> A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. See s. 120.52(16), F.S., and *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>4</sup> Section 120.52(8), F.S., and s. 120.536(1), F.S.

<sup>5</sup> *Save the Manatee Club, Inc.*, *supra* note 1 at 599.

<sup>6</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

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

<sup>8</sup> Sections 120.54(3)(a)2., 120.55(1)(b)2, F.S.

<sup>9</sup> Section 120.54(1)(b), F.S.

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

<sup>11</sup> Section 120.541(2)(a)1., F.S.

<sup>12</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>13</sup> Section 120.541(2)(a) 2., F.S.

<sup>14</sup> Section 120.541(2)(a) 3., F.S.

<sup>15</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>16</sup> Section 120.54(3)(e)6., F.S.

<sup>17</sup> Section 120.54(3)(e), F.S.

for the 5 year period.<sup>18</sup> Such a rule must be ratified by the Legislature before it may go into effect.<sup>19</sup> Ratification is accomplished through passage of a bill that ratifies the rule.

### Regulation of Assisted Living Facilities

An assisted living facility (ALF) is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.<sup>20</sup> A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.<sup>21</sup> Activities of daily living include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks.<sup>22</sup>

ALFs are licensed and regulated by AHCA under part I of ch. 429, F.S., and part II of ch. 408, F.S.<sup>23</sup> In addition to a standard license, an ALF may have one or more specialty licenses that allow the ALF to provide additional care. These specialty licenses include limited nursing services,<sup>24</sup> limited mental health services,<sup>25</sup> and extended congregate care services.<sup>26</sup> The Department of Elder Affairs (DOEA), in consultation with AHCA, is responsible for establishing minimum standards for ALFs.<sup>27</sup>

As of January 19, 2018, there were 3,089 licensed ALFs.<sup>28</sup> Of the 3,089 licensed ALFs, 1,568 had 7 beds or less, 774 had 7 to 49 beds, 433 had 50 to 100 beds, and 314 have more than 100 beds.<sup>29</sup>

### Emergency Rule 58AER 17-1, F.A.C.: Procedures Regarding Emergency Environmental Control for Assisted Living Facilities

Agencies may adopt emergency rules if they find that an immediate danger to the public health, safety, or welfare requires emergency action.<sup>30</sup> Emergency rules are effective as of the date they are filed for adoption.<sup>31</sup> Emergency rules expire 90 days after their effective date, but may be renewed if the agency has initiated rulemaking to adopt the rule and either a proposed rule challenge is pending or the proposed rule is awaiting ratification by the legislature.<sup>32</sup>

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<sup>18</sup> Section 120.541(3), F.S.

<sup>19</sup> Section 120.541(3), F.S.

<sup>20</sup> S. 429.02(5), F.S. An ALF does not include an adult family-care home or a non-transient public lodging establishment.

<sup>21</sup> S. 429.02(16), F.S.

<sup>22</sup> S. 429.02(1), F.S.

<sup>23</sup> Under s. 429.04, F.S., the following are exempt from licensure: ALFs operated by an agency of the federal government; facilities licensed under ch. 393, F.S., relating to individuals with developmental disabilities; facilities licensed under ch. 394, F.S., relating to mental health; licensed adult family care homes; a person providing housing, meals, and one or more personal services on a 24-hour basis in the person's own home to no more than 2 adults; certain facilities that have been incorporated in this state for 50 years or more on or before July 1, 1983; certain continuing care facilities; certain retirement facilities; and residential units located within a community care facility or co-located with a nursing home or ALF in which services are provided on an outpatient basis.

<sup>24</sup> S. 429.07(3)(c), F.S. Limited nursing services include acts that may be performed by a person licensed nurse but are not complex enough to require 24-hour nursing supervision and may include such services as the application and care of routine dressings, and care of casts, braces, and splints (s. 429.02(13), F.S.)

<sup>25</sup> S. 429.075, F.S. A facility that serves one or mental health residents must obtain a licensed mental health license. A limited mental health ALF must assist a mental health patient in carrying out activities identified in the resident's community support living plan. A community support plan is a written document that includes information about the supports, services, and special needs of the resident to live in the ALF and a method by which facility staff can recognize and respond to the signs and symptoms particular to that resident which indicate the need for professional services (s. 429.02(7), F.S.)

<sup>26</sup> S. 429.07(3)(b), F.S. Extended congregate care facilities provide services to an individual that would otherwise be ineligible for continued care in an ALF. The primary purpose is to allow a resident the option of remaining in a familiar setting from which they would otherwise be disqualified for continued residency as they become more impaired.

<sup>27</sup> S. 429.41, F.S.

<sup>28</sup> Department of Elder Affairs, *Revised Statement of Estimated Regulatory Costs for Proposed Rule 58A-5.036, F.A.C.* (On file with the Health & Human Services Committee).

<sup>29</sup> Id.

<sup>30</sup> Section 120.54(4), F.S.

<sup>31</sup> Id.

<sup>32</sup> Id.

On September 18, 2017, DOEA filed Emergency Rule 59AER 17-1, F.A.C. to require ALFs to acquire a generator and sufficient amount of fuel to ensure that temperatures in the facility could be maintained at 80 degrees or less for at least 96 hours in the event of a power outage. The rule required ALFs to comply within 60 days of the effective date of the rule. The rule authorized AHCA to revoke the license of an ALF that failed to comply with the rule and to levy a fine of \$1000 per day for a violation of the rule. As of January 19, 2018, 138 ALFs have indicated they are in compliance with the emergency rule.<sup>33</sup>

#### Permanent Rule 58A-5.036, F.A.C.: Emergency Environmental Control for Assisted Living Facilities

On November 14, 2017, DOEA filed a Notice of Proposed Rule to require ALFs to install an alternative power source that can maintain a temperature of 81 degrees Fahrenheit or lower for at least 96 hours in an area of no less than 30 net sq. ft. per resident. The proposed rule required the ALF to keep sufficient fuel on site to maintain the required temperature for at least 96 hours. The proposed rule allowed piped gas as a fuel source. The proposed rule also stated that local ordinances that conflicted with the fuel requirement preempted the proposed rule. The proposed rule required currently licensed ALFs to comply with its terms by June 1, 2018.

#### *Statement of Estimated Regulatory Costs*

DOEA prepared a SERC that estimated a total new one-time cost of \$280,029,663 for the 3,111 ALFs licensed as of November 14, 2017 to comply with the proposed rule.<sup>34</sup> DOEA based its estimate on estimates from an ALF trade association and from information alleged in ALF petitions for variance from the emergency rule.<sup>35</sup> DOEA provided the following estimates based on the size of the facilities:

- Less than or equal to 6 beds: \$28,000 average, with a range from \$14,000 to \$35,000 per facility. As of November 14, 2017, 1,597 ALFs had fewer than 7 beds. The total estimated cost for these facilities is \$44,716,000.
- 7 – 49 beds: \$68,637 average, with a range from \$12,280 to \$175,000 per facility. As of November 14, 2017, 775 ALFs had between 7 and 49 beds. The total estimated cost for these facilities is \$53,193,675.
- 50 – 100 beds: The average cost based on the sample size is \$106,521 (excluding outliers), with a range of \$46,207 to \$150,000 per facility. As of November 14, 2017, 428 ALFs had between 50 to 100 beds. The total estimated cost for these facilities is \$45,590,988.
- 100+ beds: The average cost based on the sample size is \$439,000 (excluding outliers), with a range of \$250,000 to \$550,000 per facility. As of November 14, 2017, 311 ALFs had 100 or more beds. The total estimated cost for these facilities is \$136,529,000.

Section 120.541(2)(d), F.S. requires the SERC to include good faith estimate of transactional costs, which includes the cost of equipment and operating costs. DOEA did not provide an estimate in its SERC of recurring costs for ALFs to operate and maintain the equipment required by the rule.

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<sup>33</sup> Supra, FN 28.

<sup>34</sup> Department of Elder Affairs, *Statement of Estimated Regulatory Costs for Proposed Rule 58A-5.036, F.A.C.* (On file with the Health & Human Services Committee)

<sup>35</sup> Id. The SERC did not explain the methodology used to combine the estimates from the ALF trade association and the variance petitions to calculate the final estimates. Similarly, the SERC did not explain the methodology for the variation in the ranges of estimates between facilities based on bed sizes, or the reasons for the significant variations in those ranges.

### *Rule Challenge*

On December 15, 2017, LeadingAge Florida<sup>36</sup> filed a petition challenging the proposed rule at the Division of Administrative Hearings.<sup>37</sup> In response, DOEA filed a Notice of Change to the proposed rule on January 19, 2017. LeadingAge Florida voluntarily withdrew its challenge and the case was dismissed on January 23, 2018.<sup>38</sup>

### *Notice of Change*

Changes made to the proposed rule require different amounts of fuel to be stored on site based on the ALF's bed numbers rather than requiring all ALFs to store 96 hours of fuel on-site: ALFs with 16 beds or less must store 48 hours of fuel onsite and ALFs with 17 or more beds must store 72 hours of fuel onsite. If local ordinances or regulations limit the amount of on-site fuel storage allowed to an amount less than that required by the rule, the ALF must develop a plan that includes storage of the maximum amount allowed by the local ordinance or regulation and a reliable method to secure the remaining fuel required by the rule within 24 hours of depletion of its on-site fuel supply.

Changes made to the proposed rule require an ALF located in an area in a declared state of emergency area that may impact primary power delivery to secure 96 hours of fuel and allows ALFs to utilize portable fuel storage containers for the remaining fuel necessary for 96 hours during the period of a declared state of emergency.

ALFs must still be able to maintain the required temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The changes to the proposed rule also require facilities to air-condition an area of no less than 20 net sq. ft. per resident rather than 30 net sq. ft. per resident.

The changes to the proposed rule allows ALFs under common control that are located on a single campus to share fuel, alternative power sources, and resident space.

ALFs are still required to comply by June 1, 2018, but changes to the proposed rule allow AHCA to grant an extension to comply with the requirements until January 1, 2019 for ALFs that can show delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes.

### *Revised Statement of Estimated Regulatory Costs (Revised SERC)*

Based on the Notice of Change, DOEA prepared a Revised SERC that estimated a total new one-time cost of \$243,912,720 for 2,951 ALFs to comply with the proposed rule.<sup>39</sup> DOEA based its estimate on estimates from the ALF trade association, a national generator supply company and ALFs that submitted petitions for variance from the emergency rule.<sup>40</sup> As of January 19, 2018, 138 ALFs were in compliance with the emergency rule.<sup>41</sup> DOEA excluded those ALFs from its estimate.

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<sup>36</sup> LeadingAge Florida is a not-for-profit corporation comprised of approximately 250 elder care organizations operating in Florida, including more than 100 nursing homes and assisted living facilities. *Petition for Determination of Invalidity of Proposed Rule, Florida Association of Homes and Services for the Aging, Inc., D/B/A LeadingAge Florida v. Agency for Health Care Administration and Department of Elder Affairs*, Case No. 17-6832RP (Fla. DOAH 2017).

<sup>37</sup> *Florida Association of Homes and Services for the Aging, Inc., D/B/A LeadingAge Florida v. Agency for Health Care Administration and Department of Elder Affairs*, Case No. 17-6832RP (Fla. DOAH 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Supra*, FN 28.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Estimates provided by the assisted living facility trade association and samples from the petitions were combined to calculate the following estimates based on the size of the ALF<sup>42</sup>:

- Less than or equal to 6 beds: \$19,033 average cost per facility, with a range from \$9,390 to \$35,000 per facility. As of January 19, 2018 there were 1,568 ALFs that had fewer than 7 beds; 68 of those facilities indicated they had achieved compliance with the emergency rule. The total estimated cost for the remaining 1,500 facilities is \$28,549,500.
- 7 – 49 beds = \$68,637 average cost per facility, with a range from \$12,280 to \$175,000 per facility. As of January 19, 2018, 774 ALFs had between 7 and 49 beds; 42 of those facilities indicated they had achieved compliance with the emergency rule. The total estimated cost for the remaining 732 facilities is \$50,242,284.
- 50 – 100 beds = \$106,721 average cost per facility<sup>43</sup> with a range of \$47,207 to \$150,000 per facility. As of January 19, 2018, 433 ALFs had between 50 to 100 beds; 17 of those facilities indicated they had achieved compliance with the emergency rule. The total estimated cost for the remaining 416 facilities is \$44,395,936.
- 100+ beds = \$439,000 average cost per facility<sup>44</sup> with a range of \$306,000 to \$550,000 per facility. As of January 19, 2018, 286 ALFs had 100 or more beds (excluding those with exactly 120 beds); 11 of those facilities indicated they had achieved compliance with the emergency rule. The total estimated cost for the remaining 275 facilities is \$116,645,400.

Based on estimates provided by a national generator supplier, DOEA estimated costs of \$4,079,600 for the 28 ALFs with 120 beds to comply with the rule. The national generator supplier provided estimates of \$70,000 to purchase, \$70,000 to install, and \$5,700 for fuel costs (\$145,700 total for each facility) for a 350KW stationary generator, which would be sufficient to power a 120-bed ALF.

Section 120.541(2)(d), F.S. requires the SERC to include good faith estimate of transactional costs which includes the cost of equipment and operating costs. DOEA did not provide an estimate in its Revised SERC of recurring costs for operating and maintaining the alternative power source.<sup>45</sup>

### *Adoption*

On February 13, 2018, DOEA filed Rule 58A-4.036, F.A.C. with the Department of State for adoption. However, ratification of the rule by the legislature is required for the rule to be effective.

### **Effect of Proposed Change**

The bill ratifies Rule 58A-5.036, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S., and expressly limits ratification to the effectiveness of the rule. The bill directs that the act shall not be codified in the Florida Statutes, but only noted in the historical comments to the rule by the Department of State.

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<sup>42</sup> Id. The Revised SERC did not explain the methodology used to combine the estimates from the ALF trade association and the variance petitions to calculate the estimates. Similarly, the Revised SERC did not explain the methodology for the variation in the ranges of estimates between facilities based on bed sizes, or the reasons for the significant variations in those ranges.

<sup>43</sup> DOEA excluded the highest estimate provided to calculate the cost. These higher estimates differed by almost \$400,000 from the lower range of estimates so the outlier higher amount was excluded from the calculation. However, it is unclear from the explanation in DOEA's Revised SERC if DOEA excluded more than one estimate and if the excluded estimate(s) came from the estimates provided by the ALF trade association or the petitions for variance or both.

<sup>44</sup> DOEA excluded the lowest estimate provided to calculate the cost. These lower estimates differed between \$200,000 and \$400,000 from the upper range of estimates so the outlier lower amount was excluded from the calculation. However, it is unclear from the explanation in DOEA's Revised SERC if DOEA excluded more than one estimate and if the excluded estimate(s) comes from the estimates provided by the ALF trade association or the petitions for variance or both.

<sup>45</sup> DOEA subsequently provided an estimate for recurring costs of \$3,634,460. However, the estimate for recurring costs likely exceeds the \$3,634,460, as the number of ALFs used to calculate the recurring costs was less than the number used to calculate the one-time costs in the Revised SERC. E-mail correspondence with DOEA Staff, February 5, 2018. (on file with the Health & Human Services Committee).

The bill is effective upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

AHCA will experience an increase in workload due to inspections to ensure compliance by ALFs with the rule's requirements. AHCA has requested a transfer of four FTE positions from its Medicaid unit to the Division of Health Quality Assurance, which licenses and regulates ALFs.<sup>46</sup> AHCA indicated to DOEA that costs associated in implementing the proposed rule would be absorbed by the four FTE positions.<sup>47</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a negative fiscal impact on ALFs that need to acquire an alternative power source to meet the requirements of the rule. Over the first five years the rule is in effect, ALFs that need to meet the requirements of the rule will experience an adverse economic impact of \$243,912,720.

In addition, ALFs will experience recurring annual costs exceeding \$3.6 million statewide.

### D. FISCAL COMMENTS:

None.

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<sup>46</sup> Governor's Budget Recommendation for Fiscal Year 2018-19, on file with the Health & Human Services Committee.

<sup>47</sup> E-mail correspondence with DOEA Staff, February 5, 2018. (on file with the Health & Human Services Committee).